OCT 1 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., Inc., JOSEPH L. AUER, HARRY K. BARR, VANDIVER BROWN, WILLIAM L. CANADY, NEIL P. CULLOM, HAROLD W. DANSER, EDWARD FOSTER, JOHN KADEL, ALFRED D. MARTIN, EDWIN L. MUNZERT, HAROLD M. TILLINGHAST, DANIEL BEISINGER, WILLIAM F. BYRNE, ARTHUR DRESSEL, CHARLES A. HARLESS, JOHN R. KINGAN, CHARLES E. LITTLETON, W. J. V. MURPHY,

Respondents.
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

GUSTAVE B. GARFIELD,
Attorney for the Petitioner.

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In the

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No. .....

Nathan Katz, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. Hoe & Co., Inc., Joseph L. Auer, Harry K. Barr, Vandiver Brown, William L. Canady, Neil P. Cullom, Harold W. Danser, Edward Foster, John Kadel, Alfred D. Martin, Edwin L. Munzert, Harold M. Tillinghast, Daniel Beisinger, William F. Byrne, Arthur Dressel, Charles A. Harless, John R. Kingan, Charles E. Littleton, W. J. V. Murphy,

Respondents.
Defendants.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

Your petitioner, Nathan Katz, a resident of Connecticut, suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc. (a New York Corporation) similarly situated, respectfully prays that a writ of certiorari be issued to review the judgment of the Appellate Division of the Supreme Court of the State of New

York, First Judicial Department entered in the office of the Clerk of the County of New York, on April 27, 1951, which (1) unanimously affirmed a judgment dated October 31, 1950, rendered by the special term of the Supreme Court of the State of New York, New York County, after trial before Justice Denis O'Leary Cohalan, without a jury, by which judgment the petitioner's Second Amended Complaint seeking a declaratory judgment and injunction was dismissed on the merits and (2) unanimously affirmed an order of the said trial court and justice dated November 3, 1950, denying petitioner's motion for a new trial. Timely motion (within 30 days) for leave to appeal to the Court of Appeals of the State of New York was made on May 15, 1951 and denied without opinion (100 N. E. 2nd 196) by said court on July 11, 1951. The filing of this petition for a writ of certiorari on or before October 9, 1951 would therefore be timely under *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

Jurisdiction

Jurisdiction is invoked under section 237 b. of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 935).

The Opinions Below and in a Companion Case

The opinion of the Appellate Division, First Department is reported in 278 App. Div. 766. The opinion of Justice Cohalan, is reported in 199 Misc. 459 (R. 1948-1962).

The opinion of the Special Term, New York County, Justice Samuel Dickstein presiding, denying defendants' motion to dismiss petitioner's complaint and also denying petitioner's motion for an injunction *pendente lite* is reported unofficially, in 99 N. Y. Supp. 2d 899. Said order of

Justice Dickstein having been unanimously modified by the Appellate Division, First Department, by granting a stay pending trial and as modified unanimously affirmed, is reported in 277 App. Div. 966.

The opinion of Judge McGohey, in a companion case is reported in 93 Fed. Supp. 762.

The opinion in the Appraisal proceeding is entitled Application of Wood, 103 N. Y. S. 110 (not officially reported. Neither it nor Justice Dickstein's opinion, also unofficially reported, are printed in the appendix, but all other opinions are).

Questions Presented

In 1934 R. Hoe & Co., Inc. (hereinafter sometimes referred to for convenience as "Hoe"), one of the oldest industrial concerns in America, found itself insolvent. It filed for relief under section 77B of the Bankruptcy Act. Its Plan of Readjustment accepted by two-thirds of its common stockholders and "A" stockholders, and approved by the decree of the United States District Court for the Southern District of New York, provided for the election of eleven directors, all of whom were to be elected by the *cumulatve vote* of the respective classes of stockholders. After the elimination of a Preferred Stock issue, temporarily created by the plan to take care of interest on the claims of bond creditors, *the plan provided for the election by the common stockholders of two directors voting cumulatively as a class and nine by the "A" stockholders "and provided further that, except with the consent of the majority of the common stock, no amendment to the Certificate of Incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time"* (R. 10). Hoe's Certificate of Incorporation was amended in accordance with the plan.

In 1947 when the Preferred stock had been completely eliminated, the "A" stockholders, acting under a provision of the Certificate of Incorporation giving them the right to consolidate with a subsidiary under section 86 of the Stock Corporation Law of the State of New York, without the consent of the common stockholders, did so consolidate with a subsidiary. *But they represented in the "proxy statemen" and it is a fact, that the voting rights of the common stockholders were to remain unaffected by such consolidation.* Accordingly the provisions for cumulative election of two directors by the common stockholders and non-amendability of the corporate charter without the consent of a majority of the common stockholders were carried over and continued in the 1947 Certificate of Consolidation.

Petitioner acquired 500 shares of the common stock of Hoe on December 23, 1949. At the time of the acquisition of his shares, the 1947 Certificate of Consolidation and the common stock certificates contained the foregoing provision for cumulative voting by common stockholders in the election of two directors and for the non-amendability of the certificate so as to divest the common stockholders of that right, except with the consent of a majority of the common stock (R. 504-7).

On July 11, 1950, without any corporate resolution, Hoe's general counsel who was chairman of the Board of Directors formed a dummy corporation under New York law, calling it Hoe Export-Import Corporation and three days thereafter on July 14, 1950 the nine "A" stock directors, over the opposition of the two common stock directors, at a meeting of Hoe's Board of Directors voted to submit to the "A" stockholders *alone* the consolidation of Hoe with its newly formed subsidiary Hoe Export-Import Corporation. This subsidiary had no assets or liabilities and had never done any business whatsoever. The "A" stock directors proposed under the guise of consolidation to amend the certificate of incor-

poration of Hoe so as to eliminate cumulative voting in the election of directors. Incidentally the so-called consolidation plan also provided for issuance to the "A" stockholders of two shares of new common stock for each "A" share, thus permanently vesting control of the common stock in the "A" stockholders.

Petitioner sued on August 18, 1950, before the meeting of "A" stockholders called for September 12, 1950, to restrain the said meeting and for a judgment declaring that said amendment of the certificate of incorporation constituted a deprivation of petitioner's property without due process of law, in violation of the fifth and fourteenth amendments to the United States Constitution, and a violation of the 1935 decrees of the United States District Court for the Southern District of New York approving the Plan of Readjustment (R. 14-15).

Although the Federal Questions were adequately presented at the very outset of the trial in the Second Amended Complaint served at the direction of the trial court "so that the Appellate Court or courts will have before them the contentions of the parties embodied in written instruments called complaints and answers, rather than having to go to the record to find out what the parties really contended" (R. 60), neither the trial court nor any Appellate Court has passed upon the Federal Questions squarely presented to them. Although repeated in the petitioner's proposed findings of fact and in the order denying a motion for a new trial the questions were unanswered, by the trial court. In evading an answer to the Federal Questions, the trial court placed its decision on two alleged state grounds, namely (1) noninterference with corporate management in the absence of fraud or improvidence, and (2) common stockholders are compelled to make the choice of either (a) taking the new stock or (b) surrendering their stock before the meeting of "A" stockholders and filing for appraisal. Peti-

tioner contends that such evasion by both the trial and Appellate Courts was for the purpose of defeating a review of the Federal Questions by this court.

Holders of 93,000 common shares (out of 160,000 outstanding), including petitioner, have not filed for appraisal. These stockholders numbering over 500 are scattered throughout the country. Those who did so file for appraisal (see Application of Woods, 103 N. Y. Supp. 2nd 110) have been litigating for one full year to have the value of their shares fixed. But as yet no conclusion has been reached.

By this device of consolidation with a paper subsidiary the "A" stockholders have while retaining their "A" stock, issued to themselves two shares of common stock for each "A" share, or a total of 191,994 shares of new common stock having a current market value of ~~$1,520,522.00~~ $1,535,952

Specifically, three principal Federal Questions are involved, which were properly raised below by petitioner.

1. Deprivation of cumulative and other voting rights.

Whether it is a deprivation of the property of the common stockholders of Hoe in violation of the Fifth and Fourteenth amendments of the United States Constitution to disfranchise them of and abrogate their right to cumulative voting in the election of directors and other voting rights in contravention of the explicit provisions of their stock certificates and Hoe's corporate charter?

2. Collateral modification of bankruptcy decrees and plans of reorganization by State courts.

Whether the decrees of the United States Districts Court entered in the bankruptcy proceeding of Hoe (R. 430-466) and the plan of readjustment and certificate of incorporation approved thereby are subject to collateral

attack or modification by judicial or administrative authorities of the State of New York by permitting the filing of a certificate of consolidation which amends the certificate of incorporation in violation of the terms of said decrees?

3. *Res adjudicata* of bankruptcy decrees.

Whether the District Court bankruptcy decrees and the Hoe Plan of Readjustment approved thereby are judgments *in rem* which the Courts of the State of New York must recognize under Federal Law under the doctrine of *Stoll* v. *Gottlieb*, 305 U. S. 165?

Additional questions are presented by the fact that the trial and Appellate courts below based their decisions on alleged grounds of State law in complete evasion of the foregoing federal questions for the purpose of defeating review by this court as petitioner contends.

4. Non interference with corporate management in absence of fraud or improvidence despite violation of federal decrees and vested property rights.

Whether a New York State court may refuse to grant relief for violation of vested cumulative and other voting rights under the situation presented by the Federal Questions 1, 2 and 3 upon the ground that in the absence of showing of fraud or improvidence, it will not substitute its judgment for that of stockholders or directors as to the economic wisdom of a plan of reorganization?

5. Appraisal the exclusive remedy in every case.

Whether appraisal under state law or acceptance of the new shares are the exclusive remedies of a class of disfranchised common stockholders who appeal to a state court to prevent the violation of their vested property rights as set forth in Federal Questions 1, 2 and 3 above?

8. Balancing of equities without answering federal questions.

Whether the Appellate Division after having itself vacated its own stay of the consummation of a plan of consolidation and thus permitted consummation thereof before hearing the appeal on the merits, can defeat a review by this court by failing to answer the foregoing Federal Questions presented to it and placing its decision upon the ground that rights, since such *vacatur* of its stay had accrued to third parties, who had meantime purchased shares in the consolidated corporation while the appeal was pending and that the balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to the plaintiff? (See *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673.)

Preliminary Statement

The First three Principal Federal Questions were adequately presented at the direction of the trial court in the Second Amended Complaint and were also presented in the motion for a new trial on questions of law, in accordance with State practice.

Petitioner in his Second Amended Complaint (R. 9-16) alleged that he was the owner of 500 shares of the Common Stock of R. Hoe & Co., Inc., having acquired his shares December 23, 1949; that R. Hoe & Co., Inc. went through reorganization under section 77B of the National Bankruptcy Act, in the United States District for the Southern District of New York; that on March 1, 1935 a decree was made in said court "Approving Modification of Plan of Reorganization and Finding Plan as Modified to be Fair"; that said plan *inter alia "provided further that, except with the consent of the majority of the common stock, no amendment to the Cerificate of Incorporation shall be made which shall impair the right of the Com-*

*mon Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time * * *"* (R. 10); that thereafter and on April 26, 1935 a decree was made in the said District Court in said 77B proceedings on notice to all classes of stockholders and creditors, that upon consent of two thirds in amount of the stockholders and creditors approving said plan, it was declared effective and the debtor R. Hoe & Co. discharged and put in possession of its property; that on July 11, 1950, the directors of R. Hoe & Co., Inc. elected by the "A" stockholders caused to be formed a dummy corporation under New York law called Hoe Export-Import Corporation which had never theretofore transacted business, had no assets or reason for existence except as a device to recapitalize and water down the common stock through the process of what was called a consolidation, without permitting the common stockholders to vote upon said recapitalization; that on August 8, 1950 the "A" directors proposed a plan of consolidation of Hoe Export-Import Corporation with R. Hoe & Co., Inc. submitting same to a vote of the "A" stockholders only; *"that to permit the defendants to carry out said reorganization and recapitalization under the guise of the aforesaid fraudulent consolidation without permitting the common stockholders the right to vote upon the said reorganization and recapitalization, would be and does constitute a deprivation of plaintiff's property without due process of law, contrary to * * * Constitution of the United States of America * * * Amendments 5 and 14 thereof, and in violation of the voting rights conferred upon the Common Stockholders as a class, by the decrees of the United States District Court for the Southern District of New York and the Plan of Reorganization therein set forth and incorporated, dated March 1, 1935 and April 25, 1935 * * *"* (R. 14). Petitioner demanded judgment for an injunction restraining the holding of said meeting of "A" stockholders pursuant to said Notice of Meeting dated August 8,

1950, *"and for a declaratory judgment that the said proposed meeting if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of * * * the Constitution of the United States of America, and amendments 5 and 14 thereof"* (R. 15).

In entering and signing the order denying plaintiff's motion for a new trial on November 3, 1950, the trial court took official notice of petitioner's contention that the court had failed to take cognizance of the Plan of Readjustment entered in the 77 B proceedings and of the decrees of the United States District Court for the Southern District of New York dated March 1st, 1935, April 26, 1935 and June 25, 1935, *"which provide that the common stockholders shall elect two directors voting cumulatively:* shall have equal voting rights on all matters other than the election of directors: *and that the Certificate of Incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class"* (R. 49).

In the order denying a motion for a new trial the trial court also overruled petitioner's contention that the controlling decision of the Supreme Court of the United States in *Stoll* v. *Gottlieb,* 305 U. S. 165 required the trial court to give effect as *res adjudicata* to the terms of the Plan of Readjustment contained in the order of the United States District Court dated March 1, 1935 and "that said plan is not subject to collateral attack and by the Court's decision it collaterally attacks and voids as if it never existed, the Plan of Readjustment contained in the order of March 1, 1935" (R. 50).

Since the Second Amended Complaint and the order denying petitioner's motion for a new trial were before the Appellate Division and before the Court of Appeals in the Record on Appeal, as it now appears before this Court, petitioner respectfully submits that he has complied with the requirement of showing properly raised federal ques-

tions for review in this Court. A fuller record proof of this fact required by the rules of this Court will be adverted to later in this statement with quotations from pertinent portions of the record to sustain petitioner's contentions.

Statement

R. Hoe & Co., Inc., a New York corporation (hereinafter sometimes referred to as Hoe), was organized in 1924, as successor of an old established business founded about 1815. It manufactures printing presses and other products. On August 1, 1934 an order was entered in the United States District Court for the Southern District of New York approving the petition of Hoe for relief pursuant to the provisions of section 77B of the Bankruptcy Act as amended (48 Stat. 912). At the time of the filing, the only amounts of stocks "Outstanding in the Hands of the Public were:

Class 'A' stock	96,000 shares
Common Stock (including voting Trust Certificates for Common Stock)	160,000 shares."

In a Plan of Readjustment proposed by the then debtor Hoe on March 1, 1935 (dated as of January 16, 1935) which plan was subsequently accepted by both classes of stockholders ("A" and Common), and by the U. S. District Court for the Southern District of New York it was provided in the "Introductory Statement" of the plan, "*until all the arrearages of dividends on the Class 'A' stock shall have been paid, the Class 'A' stockholders will be entitled to elect nine directors and the Common stockholders two directors.* * * * ALL VOTING FOR DIRECTORS WILL BE CUMULATIVE" (from page 2 of Plan quoted in appendix).

To effectuate the foregoing introductory or legislative provisions of the plan, provision was made under "Miscel-

laneous" items (p. 22 of plan) for the amendment of Hoe's certificate of incorporation so that "*continuing until all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period, the holders of common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the Board of Directors*", and it "*provided further that, except with the consent of the majority of the common stock, no amendment of the certificate of incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time*" (for fuller quotation from Plan of Readjustment, dated January 16, 1935, see appendix).

The Certificate of Incorporation of Hoe was accordingly amended on May 29, 1935 by the debtor R. Hoe & Co., Inc. pursuant to an order of the United States District Court, Southern District of New York dated May 15, 1935 (R. 435).

On June 25, 1935 an order was entered in the United States District Court for the Southern District of New York for Transfer of Property and final Consummation of the Plan of Readjustment, under Subdivision (f) of Section 77B (R. 444). Having been accepted by 57,094 shares of Class "A" stock and 154,567 shares of common stock (R. 440), claims based on 96,000 shares of "A" stock and 160,000 shares of common stock were "allowed to participate in the reorganization in the manner provided in the Plan" (R. 451).

On January 8, 1947, "without disturbing the common stock" (R. 23), Hoe proposed a plan of consolidation with a *bona fide* subsidiary, designed to eliminate arrears on "A" stock, then amounting to $83 per share. This was done by paying $3 per share in cash, and issuing four

shares of B stock (newly created) redeemable at $20 per share from earnings applicable to common stock. The plan, voted upon by "A" stockholders *alone* was represented as *"preserving the rights of Common stock and at the same time preserving for Class A Stockholders the substance of their present privileges and rights"* (R. 23). Indeed the provisions of the Plan of Readjustment of January 16, 1935 were carried over intact into the "Certificate of Incorporation and Certificate of Consolidation" so that the rights of the common stockholders to elect two directors voting cumulatively as a class and to vote on any amendment of the certificate of incorporation which would divest them of those rights were preserved to the letter.

Since the new issue of B stock was accepted by the "A" stockholders in full acquittance of cumulative dividend arrears on their stock, the certificate of incorporation was amended so as to provide for the continuance of the scheme of election of directors, contained in the Plan of Readjustment dated as of January 16, 1935, to wit: nine to be elected by the "A" stockholders and two by the common stockholders voting cumulatively as a class, while the B stock remained outstanding.

Upon elimination of the B stock, control of Hoe was to pass to the common stockholders who were then to become entitled to elect six out of the eleven members of the Board of Directors.

In accordance with the 1947 proposed plan of consolidation the Certificate of Incorporation was amended as follows:

(1) In paragraph Fifth, sub. (h) of the said 1947 Certification of Incorporated Consolidation it was provided: *"Continuing until no shares of B Stock shall be deemed to be outstanding, and until all dividends accumulated since October 15, 1946 and unpaid on the Class A stock are paid in full through the last quarterly dividend period, the hold-*

ers of Class A stock voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of Directors and the holders of the Common Stock, voting cumulatively as a class, shall be entitled to elect and continue in office, the two other members of the Board of Directors" (R. ~~1512~~ 504)

(2) In paragraph Sixth sub. (k) of the 1947 Certificate of Incorporation and of Consolidation it was provided: *"except with the consent of a majority of the Common Stock, no amendment of the Certificate of Incorporation or Certificate of Consolidation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors, from the time such right commences as provided in subparagraph (h) as such Board shall be constituted from time to time"* (R. ~~1518~~ 506)

Petitioner is the owner of 500 shares of the common stock of R. Hoe & Co., Inc., having acquired his shares December 23, 1949. As above demonstrated at the time of the acquisition of his shares, petitioner together with all other common stockholders had cumulative voting rights in the election of two directors and the right to vote on any amendment to the Certificate of Incorporation which would deprive the common stockholders of that right (R. ~~1512-1518~~. 504-506)

The 1947 Plan of Consolidation carried into it the original provision of the plan of readjustment dated as of January 16, 1935, which meant that upon elimination of the B stock the common stockholders were to elect six and the "A" stockholders five of the directors of Hoe, voting cumulatively as a class. In the period of three years and six months, from the adoption of the 1947 consolidation plan on January 28, 1947, to July 11, 1950, Hoe had redeemed 189,221 shares of B stock out of 383,988 shares originally issued. *The day of the common stockholders' control was fast approaching.*

It was to avoid this inevitable eventuality (*i. e.*, loss of control) provided for in the original Plan of Readjustment in Bankruptcy that the "A" stockholders embarked upon the plan of "consolidation" which is complained of by the petitioner. The chairman of the board of directors elected by the A stockholders bluntly stated the reason for the Plan on March 15, 1950 in a paper entitled

> *"Reasons for acceptance by Class A stockholders* • • •
> 5. *The A stock would retain control of the company free of any threat involved in a coup by the Common stock"* (R. 556).

On July 11, 1950, the said chairman without a corporate resolution, organized a paper corporation, a dummy pure and simple (calling it Hoe Export-Import Corporation), at a cost of $50. It never has had any assets, liabilities or performed any business (R. 72-77).

On July 14, 1950, the "A" directors, over the objection of the two common directors, voted to submit to the "A" stockholders *alone* at a stockholders' meeting scheduled for September 12, 1950, the consolidation of R. Hoe & Co., Inc. with its paper subsidiary Hoe Export-Import Corporation. In the proposed certificate of consolidation, cumulative voting by the common stockholders for their two directors was eliminated, because in the words of the president of Hoe, cumulative voting was "an Unmitigated Curse" (R. 545-6).

In this manner by means of the consolidation and without a vote of the common stockholders the A directors (who were in custodial control only under the Bankruptcy decree until the arrears of dividends, compounded by the issuance of B stock had been eliminated), issued two additional shares of new common stock for each share of A stock outstanding. Thus, control, was intended to and did permanently pass to the A stockholders who now own more than a majority of the common stock and also own their A stock. The common stockholders were given one

share of stock in the new enterprise for each share in the old and their cumulative voting rights were taken away from them without their consent. Since voting of Hoe's common stock is now by a simple majority of the votes cast, the original 160,000 common stockholders have no representation at all. The A shareholders not only elect their own A directors, but also control the election of the two common directors. The disfranchisement of the original 160,000 common stockholders is thus permanently established.

When petitioner sued on August 18, 1950, to enjoin the consummation of this plan of consolidation he was joined in his suit by Alfred D. Martin, a large stockholder and director elected by the common stockholders who had voted against the plan.

That the petitioner on the trial pointedly brought his contention on the subject of the destruction of the cumulative class voting rights of the common stockholders in the election of two directors, to the attention of the trial court, clearly appears from the cross examination of the president of R. Hoe & Co., Inc., one Joseph Auer (R. 339-341). There can therefore be no claim of oversight as a reason for not answering the Federal Questions:

"*Cross Examination by Mr. Garfield:*

Q. You know that at the present time the common stock has the right to cumulative voting in the election of directors? A. *I do.*

Q. *You know, do you not, that that right came to them as a result of the plan of readjustment in the United States District Court on March 1st, 1935.*

Mr. Cullom: I object to that, if the Court please, as argumentative. Your Honor has all the documents before you and you can determine that.

The Court: *They had it at the time the plan was adopted. That is all you need. Never mind where it came from; it was the rule at that time.*

Q. You have told his Honor that this plan did not contemplate doing anything adverse to the common stock, did you not? A. That is right.

Q. *Do you consider the taking away of the right of cumulative voting as an adverse act?* A. *I do not.*

Q. *You do not?* A. *No"* (R. 339).

"Q. Isn't it because you consider that cumulative voting is troublesome to R. Hoe & Company that you want to take it way from the common stockholders, as a class? A. *The answer is definitely yes.*

Q. Were you acquainted with the terms and provisions of the decree of the United States District Court for the Southern District of New York containing the plan of readjustment, signed by Judge Cox, dated March 1st, 1935, at the time you, as a director, took the action leading to submission—

The Court: Why don't you give him a date? Was he acquainted with it on the date of this meeting?" (R. 341).

"Mr. Garfield: On the date of this meeting.

The Witness: Only in generality" (R. 342).

An examination of the "Proxy Statement" filed with the Securities and Exchange Commission shows that Hoe did not reveal that the common stockholders had the right to vote upon any proposed amendment of the Certificate of Incorporation which would deprive the common stockholders of cumulative voting right (R. 482) in the election of directors. It will also be observed that in the "Proxy Statement" dated August 8, 1950 (R. 482) Hoe stated the reason for the disfranchisement of the common stockholders as follows (p. 10 of Proxy Statement):

"Voting Upon the Proposed Consolidation

The affirmative vote of the holders of record of at least two-thirds of the outstanding shares of the Class A stock of the corporation is necessary for the author-

ization of the execution and filing of the proposed Certificate of Consolidation. *The company's charter provides that the holders of B and Common stocks 'shall be specifically excluded from the right to vote in a proceeding * * * for a consolidation pursuant to section 86 of the Stock Corporation Law * * *.' It is the opinion of counsel, therefore that neither the B nor Common stock is entitled to vote on this proposal.* The outstanding stock of Hoe Export-Import Corporation all of which is owned by the Corporation, will be voted in favor of the Plan."

Petitioner's answer to this proposition in every state court to which the matter has been submitted has been that a consolidation is nevertheless a prohibited amendment.

"The Court should pierce the corporate veil of the recently formed dummy, Hoe Export Import Corporation, disregard its form as a subsidiary, and regard it in substance as an instrument or device conceived and created by the Class A directors of R. Hoe & Co., Inc. for the sole purpose of the evasion of the law which gives the common stockholders the right to vote upon the proposed consolidation."

Wormser, *The Disregard of the Corporate Fiction and Allied Corporation Problems,* pages 62-63;
Small v. *Sullivan,* 245 N. Y. 343;
U. S. v. *Lehigh Valley R. R. Co.,* 220 U. S. 257;
Northern Securities Company v. *U. S.,* 193 U. S. 197;
Stockton v. *Central R. R. Co.,* 59 N. J. Eq. 52;
Gregary v. *Helvering,* 293 U. S. 465.

Petitioner has urged below in vain, that where (1) the Plan of Readjustment, in Bankruptcy, dated as of January 16, 1935, (2) the Certificate of Incorporation, dated May

29, 1935, issued pursuant to the Plan of Readjustment, (3) the Certificate of Consolidation, dated January 28, 1947, (4) the petitioner's certificate of stock issued to him on December 23, 1949, all contained the provisions giving to the common stockholders voting as a class the right to elect two directors and provided further that the certificate of incorporation could not be amended without their consent so as to change the cumulative voting rights of the common stockholders, that such amendment could not be accomplished by merely calling it a consolidation. In short the only consolidation contemplated by the charter was one which did not affect the class and other voting rights of the common stockholders. There is no magic in mere nomenclature. A consolidation effects an amendment of the certificate of incorporation under section 86 of the New York Stock Corporation Law, from which we quote in the appendix. If therefore as here the amendment is one which the charter inhibits without the vote of the common stockholders, to permit such amendment without such vote is a deprivation of the common stockholders' property without due process.

Pertinent portions of the record or summary thereof to support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction.

1. Petitioner's Second Amended Complaint (R. 9-16) after setting forth the pertinent provisions of the Plan of Readjustment, dated January 16, 1935, its acceptance by all classes of stockholders, "A" and common, the purchase by petitioner of his shares on December 23, 1949, and the use of the device of consolidation with a paper entity Hoe Export Import Corporation, alleges in Paragraph Ninth (R. 42), the following:

> "Ninth: That to permit the defendants to carry out the said reorganization and recapitalization under

the guise of the aforesaid fraudulent consolidation without permitting the common stockholders the right to vote upon the said reorganization and recapitalization, *would be and does constitute a deprivation of the plaintiff's property without due process of law, contrary* to Article 10, Section 6 of the Constitution of the State of New York and *the Constitution of the United States of America,* Article X, Section 10, and *Amendments 5 and 14 thereof, and in violation of the voting rights conferred upon the Common stockholders as a class, by the decrees of the United States District Court for the Southern District of New York and the Plan of Reorganization therein set forth and incorporated dated March 1, 1935 and April 25, 1935, which decrees and Plan of Reorganization are heretofore referred to in paragraphs 'Second' and 'Third' hereof"* (R. 42).

2. The prayer for relief in the second amended complaint raises the Federal question presented as follows (R. 45):

"WHEREFORE *plaintiff demands judgment* enjoining and restraining the defendants and each of them from holding or permitting the holding of a special meeting of Class 'A' stockholders, pursuant to the Notice of Meeting dated August 8th, 1950, and *for a declaratory judgment that the said proposed meeting if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of the* laws of the State of New York, the Constitution of the State of New York, *the Constitution of the United States of America,* and *Amendments 5 and 14 thereof,* the Securities Exchange Act of 1934, and the appropriate and relevant regulations issued thereunder; and the plaintiff prays for such other alternative or different

relief as may appear to be just and proper in the premises, as well as the costs and disbursements of this action."

(3) *Plaintiff's Proposed Findings of Fact* which were timely submitted to the trial court on October 24, 1950, three days before the rendition of decision on October 27, 1950 (R. 654) makes such full statement of the Federal Questions involved that it would offend the rule against prolixity to quote said proposed findings in full. However they will be found at Record 32-36. These Proposed Findings are deemed to have been refused under section 439 of the New York Civil Practice Act as follows:

"439. *Requests to find.*

Upon a trial by the court without a jury, each party shall be afforded a reasonable opportunity, before the cause is finally submitted to the court, to submit requests to find the essential facts which he deems established by the evidence. Each request must be numbered and so prepared with respect to its length and the subject and phraseology thereof that the court may conveniently pass upon it. *If the court fails to grant a request either specifically or by embodying it in the decision it shall be deemed to have been refused.*"

(4) *The Order Denying plaintiff's motion for a new trial* (timely entered by the trial Justice Cohalan on November 3, 1951 [R49-51], within the thirty days required to take the appeal to the Appellate Division, see section 552 Civil Practice Act, N. Y.) recited the grounds of the motion, calling to the court's attention the decision of the Supreme Court of the United States which the trial court's judgment and decision offended against, namely *Stoll* v. *Gottlieb,* 305 U. S. 165 rehearing denied 305 U. S. 675.

As appears from the order denying such motion for a new trial the grounds of the motion were:

> (a) The trial court has failed to take cognizance of the Plan of Readjustment of the United States District Court 77B proceedings and the orders of the said Court dated March 1, 1935, April 26, 1935 and June 25, 1935, which provide that the common stockholders shall elect two directors voting cumulatively; shall have equal voting rights with the A stockholders on all matters other than the election of directors; and that the Certificate of Incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class.
>
> (b) The controlling decision of the Supreme Court of the United States, *Stoll* v. *Gottlieb*, reported in 305 U. S. 165, rehearing denied 305 U. S. 675, reversing *Gottlieb* v. *Crowe*, 368 Ill. 88, which case as decided by the said Supreme Court of the United States, holds that the courts of the several states must give effect as *res adjudicata* to the terms and provisions of a Plan of Readjustment under a proceeding in 77-B, and that said plan is not subject to collateral attack and that by the court's decision it collaterally attacks and voids as if it never existed, the Plan of Readjustment contained in the order of March 1, 1935 (R. 49-50).

The way in which the questions presented were passed upon by the State courts.

At no time did any judge or Court of the State of New York in the entire course of this litigation directly pass upon the three principal Federal Questions presented to this court for consideration by petitioner. In plain words the questions were ignored by all courts to which they were presented, although the record shows expressly and

by clear intendment that they were adequately presented (*New York, ex rel. Bryant* v. *Zimmerman,* 278 U. S. 63). The State court decisions are purportedly based upon non federal grounds and must be regarded as "so certainly unfounded that it may properly be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question" *Enterprise Irrig. Dist.* v. *Farmer's Mutual Canal Co.,* 243 U. S. 157.

Justice Cohalan the trial justice asserts the validity of the July 1950 plan of consolidation on his own *ipse dixit.* "It is clear that the consolidation as proposed is not illegal. It is equally clear that by the terms of the certificate of incorporation and the plans in existence as of 1950 the present common stockholders have no right to vote on the proposed consolidation" (R. 653). This finding is so clearly contrary to the documentary proof that it may be regarded as (petitioner respectfully submits) an arbitrary device to prevent review by this court.

The trial justice observed that with respect to the 1947 consolidation, the common stockholders did not vote, but he failed to observe that none of their rights or privileges were affected thereby. There is a great distinction between the 1947 consolidation which left the voting rights of the common stockholders unaffected and the 1950 consolidation which destroyed their vested rights to vote cumulatively in the election of two directors.

In a consolidation used to evade a Federal law, this court has held that courts must look to the substance and not to the form of the transaction. In *Northern Securities Co.* v. *United States,* 193 U. S. 197, 345, this Court said "Every corporation created by a State is necessarily subject to the Supreme Law of the land", and at page 347 "no device in evasion of its provisions however skillfully such device may have been contrived, * * * is beyond the reach of the Supreme Law of the land".

The attention of the trial justice was, but in vain, called to the opinion of Justice Reed in *Stoll* v. *Gottlieb,* 305 U. S. 165.

The trial court in relegating the petitioner to the Hobson's choice of taking the new shares or taking appraisal, relied on two New York cases, *Anderson* v. *International Minerals and Chemical Corp.,* 295 N. Y. 343 and *Beloff* v. *Consolidated Edison Co.,* 300 N. Y. 11, in both of which cases the plaintiff was a dissenting stockholder seeking to upset the will of the majority. Here the petitioner is no dissenter from his class. He represents and seeks to vindicate the vested franchise rights on behalf of an entire class of disfranchised common stockholders who have been deprived of the right to vote cumulatively in the election of directors by an amendment of the certificate of incorporation made without their consent.

> "The right of a stockholder to vote for directors is property and he cannot be deprived of it without his consent, even by giving him what others might regard as a better substitute. He cannot be deprived of his own by an offer of something better unless he agrees to it." Lord v. Equitable Life, ~~239 N. Y.~~ 194 N.Y. 212,

The Appellate Division, First Department itself had cited with approval (1920) the case of *Lord V. Equitable Life, supra,* in the earlier case *Matter of the Election of Directors of the Jamaica Consumers Ice Company,* 190 App. Div. 739, unanimously affirmed without opinion, 229 N. Y. 516. A clearer statement on the nature of the vested property right of cumulative voting and its right to protection under the constitution has not been made by any court. At 190 App. Div., p. 741, Philbin, J., writing for the unanimous court, said:

> "While the stockholders, as such, can have no direct power of management, the capital stock owned by them is property. It represents an investment upon which

they are entitled to dividends, provided they are earned, and whether they can be earned or not depends upon management. The right to vote for directors, therefore, is the right to protect property from loss and make it effective in earning dividends. (*Lord* v. *Equitable Life Assurance Society,* 194 N. Y. 212, 228.) *The intent of the law conferring the right to vote cumulatively was undoubtedly to give the minority stockholders an opportunity to secure representation upon the board of directors.*

In Tomlin v. Farmers & Merchants Bank (52 Mo. App. 430, 436) the court said, referring to cumulative voting: 'The right is one guaranteed by the law, constitutional and statutory, it is personal to the stockholder, it can be exercised or not by such stockholder as he may himself elect. (*Pierce* v. *Commonwealth,* 104 Pa. St. 155.) It, therefore, cannot be taken from him by a resolution or by-law adopted by a majority of shareholders.' (See, also Attorney-General v. Looker, 111 Mich. 498; Schmidt v. Mitchell, 101 Ky. 570.)"

Petitioner claims no more in this case than to be bound by the vote of the majority of 160,000 common stockholders of his class. He is no dissenter from those within his class. His right to vote cumulatively in the election of two directors can no more be bartered away than can the elective franchise of voters in Federal elections. Both franchise rights are protected by the United States Constitution. Yet the trial court has ruled that the petitioner is compelled to sell his shares in appraisal or bow to the will of the A shareholders as outlined in the "proxy Statement" which is directly contrary to his ruling on the trial.

"The burden on you gentlemen who are plaintiffs, is to establish that a common stockholder has a right, under the original charter and the many amendments of this corporation, and any direction of the Federal

Court as to those amendments, to be notified of the change that was effected, and to vote with the A and B stockholders at a meeting called to effectuate that change. The proposition of how he should be paid off and that sort of thing, is not the main one'' (R. 119).

Anderson v. *International Minerals, etc.* is so clearly distinguishable that its citation by the trial court may properly be regarded as an evasion of a decision on the Federal Questions presented to it. Plaintiff Anderson had been given an opportunity to vote upon the proposed consolidation along with all other stockholders of his class and two thirds of the stockholders voting assented affirmatively to the consolidation. Anderson was a lone dissenter. He did not avail himself of the opportunity to vote. The only thing sought to be accomplished by the consolidation was a change in the provision for the payment of cumulative dividends as yet unearned, not the destruction of cumulative voting rights in the election of directors. The Court of Appeals limited the dissenter to appraisal.

Beloff v. *Consolidated Edison Co. of N. Y.* is a case *sui generis.* Legislation was passed by the State of New York authorizing the merger of electric gas and steam corporations if approved by the Public Service Commission, where the merging or taking corporation owns 95% or more of the merged or taken corporation. Such merger could take place without the consent of the minority if approval was first obtained from the Public Service Commission.

Consolidated Edison Co. owning 99.6% of Brooklyn Edison Co. having first obtained the requisite approval from the Public Service Commission did so merge the two public utilities without the consent of Beloff, the plaintiff. It offered $135 per share to him or the alternative of appraisal proceedings. He refused and sued to set aside the merger, alleging a violation of the Fourteenth Amendment and section 10 of Article 1 of the United States Constitution.

The decision of Court of Appeals in the *Beloff* case went upon the ground of the express reservation of the power in the New York Constitution to "alter, suspend and repeal charters of corporations" (300 N. Y. p. 19).

In the instant case the change in the voting status of the common stockholders was not effected by the State pursuant to its reserved powers. Reserved power to change or modify the Plan of Readjustment resides only in the United States District Court for the Southern District of New York under the recent pronouncement (February 1, 1951) of the Circuit Court of Appeals for the Second Circuit in *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 Fed. 2nd 525. The Second Circuit specifically overruled a long line of its own decisions which had held that power to supervise, modify or change plans of reorganization was relegated to the States, once the Plan had been adopted and the case closed. It now holds that whether the power of change, modification or alteration is reserved or not, the Bankruptcy Court alone has the discretionary power to alter or modify the plan. "The court may never under the guise of 'alteration' or 'modification' substitute an entirely new plan in place of the original", citing with approval *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 7th Cir., 141 Fed. 2nd 65.

Petitioner sought the intervention of the United States District Court for the Southern District of New York in the bankruptcy proceedings of R. Hoe & Co., Inc. to prevent the violation of the Plan of Readjustment. His petition was dismissed on November 6, 1950 by Judge McGohey whose opinion is printed in the appendix. Judge McGohey ruled:

> "It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep 'leading strings' (in re Flatbush Ave.-Nevins St. Corp., 2nd Cir., 133 F. 2d 760) on or be a 'wet nurse' (North

American Car Corp. v. Peerless W. & W. Mach Corp., 2 Cir., 143 F. 2nd 938) to reorganized concerns. This reorganized debtor was in 1935 sent 'out into the state as fully subject to state law as though this court had nothing to do with its creation.' (In re Ambassador Hotel Corp., 2 Cir., 124 Fed. 2d 435.) The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court. (Davega-City Radio, Inc. v. Boland, S. D. N. Y., 23 F. Supp. 969, 970.)

Petitioner appealed from the order of Judge McGohey to the Circuit Court of Appeals for the Second Circuit, which Court, without so much as permitting the petitioner to file his record (then fully prepared), dismissed the appeal.

It is ironic that after such dismissal the Circuit Court of Appeals for the Second Circuit, on February 1, 1951 in the case of *Prudence Bonds Corp.* v. *City Bank, supra,* specifically overruled the *Flatbush, North American* and *Ambassador Hotel* cases relied on by Judge McGohey and the Appellate Division decided the appeal now before this court without so much as mentioning the Federal Questions presented to it for decision.

The decision of the Appellate Division is as follows:

"*Per Curiam.* This action by a holder of common stock of a corporation claiming to sue on behalf of himself and all other common stockholders, was instituted primarily for an injunction to restrain a corporate consolidation. Months before the appeal was heard, the consolidation had been fully consummated and the stock of the corporation reissued in accordance therewith, after plenary trial in which Special Term had entered judgment in defendant's favor dismissing the complaint on the merits.

Relief was also sought on the ground of fraud but *the evidence supports the trial court's finding that there was no fraud.*

The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties, a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings.

Under the state of facts disclosed, the judgment in favor of defendants-respondents dismissing the complaint and cross complaint, and the order denying plaintiff's motion for a new trial, should be affirmed." (Italics ours.)

The Appellate Division decision is placed upon two grounds both of which are on apparent non federal grounds. Since the Federal Questions were clearly presented in the Second Amended Complaint, and a decision on the Federal Questions Presented was necessary to a determination of the case, petitioner shall endeavor to show, that neither of the grounds assigned for decision are tenable to defeat review by this court.

(1) The Appellate Division said:

"* * * the evidence supports the trial court's finding that there was no fraud."

This is what the trial court actually said (R. 653):

"There has been no showing of fraud and while a serious effort has been made to show that the plan will

not be beneficial to the corporation itself and will be harmful to the common stockholders, such a showing has not been made and no basis has been presented which would justify this court in exercising its visitorial powers."

Petitioner submits that he did not ask the intervention of the visitorial power of the state courts because of fraud or improvidence of the Hoe directors as to the economic wisdom of the plan, as claimed by the trial court. Petitioner merely sought the vindication of his vested property rights contained in the Hoe Plan of Readjustment in Bankruptcy, in the charter issued pursuant thereto, in the 1947 Consolidation Certificate (R. 490) and in petitioner's present stock certificates. The gravamen of petitioner's cause of action is in contract. As was previously shown the trial court so ruled during the trial (R. 119) and petitioner acquiesced in said ruling (R. 120). But even if it were necessary for petitioner to establish fraud, the device of "consolidation" with the phantom, Hoe Export Import Corporation is so patently fraudulent as to be declarable as such, by this court despite the contrary decision of the trial court and Appellate Division. Moreover it is a fraudulent destruction of the rights protected by Federal law which petitioner seeks to vindicate.

(2) The Appellate Division itself permitted the consummation of the plan of consolidation by vacating its own stay, in November 1950, three months before the appeal could be heard on the merits. The chronology is stated in the opinion of McNally, J., in his decision in the appraisal proceedings (*Application of Wood, et al.*, Jan. 26, 1951, 103 N. Y. S. 110, 112, not officially reported):

"It appears that on or about August 8, 1950 an action was instituted entitled, 'Katz v. Hoe', having for its purpose the staying of the pending consolidation of the respondent with Hoe Import-Export Corpora-

tion. On September 11, 1950 an injunction issued from the Appellate Division in said action staying the respondent herein from filing the certificate of consolidation. Thereafter and on October 4, 1950, 277 App. Div. 966, 99 N. Y. S. 2d 853, the Appellate Division stayed the respondent from all proceedings with respect to the proposed consolidation pending the trial of the action entitled 'Katz v. Hoe.' On November 1, 1950 a further stay of the filing of the certificate of consolidation issued from the Appellate Division. Subsequently the respondent was relieved of the stay and thus enabled ~~him~~ on November 29, 1950 to file and thereby complete the consolidation."

Where therefore the Appellate Division was itself responsible for the *vacatur* of the stay, it should not be permitted by its own decision to perpetuate a deprivation of petitioner's property rights under the doctrine of balancing equities. (See *Brinkerhoff-Faris Trust Co.* v. *Hill,* 281 U. S. 673, 678.)

(3) Furthermore in asserting that petitioner and the defendant Martin were the only common stockholders litigating the questions before it the Appellate Division overlooked the ruling of the trial court which excluded proof of acquiescence by the great bulk of the common stockholders in the present suit. The Trial Court ruled:

"Mr. Baron: All right, sir. I offer it on this further ground, that it does indicate that neither the plaintiff nor for that matter, the defendant Martin stand alone; that the wishes of the common stockholders—

"The Court: I am not interested in that. If a man stands alone and still has rights, as far as I can, I will enforce those rights. My ruling is, I don't care about the number of people who may have taken a particular course at a particular time. If any one person is wronged, and that goes for your client and for the

other plaintiffs here, by what was done, that is enough for me. It is a basis for any action I will take. On the other hand, if no one person in any class was wronged, nobody else in that class was hurt, whether they are here or not" (R. 122-123).

It is not mete therefore, for the Appellate Division to count heads on appeal, when proof of the number of participants on the side of the petitioner was excluded by the trial court and acquiesced in by the parties on the ground that "If a man stands alone and still has rights, as far as I can, I will enforce those rights."

Reasons for Granting the Writ

It is apparent that the State courts have by evasion of the Federal Questions involved, though properly presented to them, decided the case in a way probably not in accord with applicable decisions of this court. The controlling decision of this court in *Stoll* v. *Gottlieb,* 305 U. S. 165, has been ignored on the question of *res adjudicata.* The State courts have in effect held that once the debtor R. Hoe & Co., Inc., was discharged in the 77B proceedings, the Plan of Readjustment ceased to have any effect on the rights of stockholders and only its certificate of incorporation was effective to control the rights of the parties. It has been held in effect that the tail wags the dog and not the dog the tail.

Once this principle is established (as it now is by the State courts decision in this case), it becomes futile for people involved in 77B or Chandler Act proceedings to attempt to define their prospective voting rights with meticulous care. Any State court by winking at a change of plan and calling it a "consolidation" could sanction the greatest destruction of vested voting rights by invoking the doctrine of non interference with corporate

management. Such a decision if permitted to stand will in the future be a source of great danger to the vesting voting rights of innocent stockholders who have thought themselves protected by the judgments *in rem* issued by bankruptcy courts.

Furthermore the State courts' decisions fly in the face of uniform circuit court opinions of two circuits to wit: *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.*, 186 Fed. 2nd 525 (2nd) and *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 141 Fed. 2nd 935 (7th). Both of these courts unite in holding that not even the Bankruptcy court (whether power to do so is reserved or not), has the right to alter vested rights provided for in a plan of reorganization without the consent of the parties affected.

But the State courts have countenanced the violation of this vested right of petitioner and his class to vote because of this so-called right to "consolidate" contained in the Hoe Charter. The answer to this is that:

> "No Corporate person can excuse a departure or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence." Harlan J. in *Northern Securities Co.* v. *United States, supra.*

Furthermore, while this court in *Looker* v. *Maynard*, 179 U. S. 46, ruled that a state legislature may, under its reserved power so amend charters of corporations so as to grant cumulative voting rights to stockholders (and by like token take them away) without offending the due process clauses of the United States Constitution, it was careful to point out that this ruling did not apply "to an agreement collateral to the charter, and which the legislature could not reserve the power to alter or repeal."

Cumulative voting is mandatory by statute in at least eight states, of which Pennsylvania is industrially the most important. In those states it represents a Magna Carta for stock interests less than a majority. But New York is not among the states where cumulative voting is mandatory. In this case cumulative voting is by contract of the parties. Once authorized it is a vested property right. Petitioner comes by his cumulative voting rights by the succession of contractual obligations above enumerated. Not the state legislature but a group of A directors by their unilateral action seeking to vest control permanently in themselves contrary to a Plan of Readjustment in Bankruptcy, aided by the State courts have deprived the petitioner and all other common stockholders of Hoe, of their vested voting rights. This is manifestly a great wrong prohibited by Federal statute and the fifth and fourteenth amendments to the United States Constitution.

While the trial court held that dissenting common stockholders "have an adequate remedy under section 21 of the stock corporation law", *i. e.*, appraisal, it omitted to mention that to petitioner and to holders of a majority of common stock which did not avail themselves of the doubtful privilege of a lawsuit over the value of their shares (see *Application of Wood,* 103 N. Y. Supp. 110, where the Hoe appraisal lawsuit is reported), *the time to file for appraisal expired 20 days before the meeting called for September 12, 1950.* If therefore, petitioner had a vested property right to vote his shares cumulatively and to vote on the amendment of the certificate of incorporation he could not be compelled to forego that privilege in exchange for a bitterly fought lawsuit. No one offered him ten cents for his shares in advance of the meeting. Indeed the management of Hoe claimed before appraisal that the shares had little or no value since there was a book deficit against them. Of the two alternatives the lawsuit which leaves his shares intact or the lawsuit which takes his shares away and gives him the privilege of litigating in a state

where he would have to waive Federal jurisdiction because of diversity of citizenship the former is the lesser evil. No man is compelled to buy a lawsuit and that is what appraisal does. Appraisal was never designed to serve as the sole remedy of an entire class of disfranchised stockholders. Such disfranchisement does indeed offend the Fifth and Fourteenth Amendments of the United States Constitution and it is important that this Court so rule.

Importance of the Issues Herein

It is of tremendous importance to the country at large that the supremacy of the Federal power over bankruptcy proceedings be maintained and that Plans of Reorganization be carried out and not frustrated by those in temporary custodial control, such as the A stockholders in this case. The conflict between the rule apparently followed by the State courts in this case and that of two Circuit Courts of Appeals is not conducive to legal stability of property rights vested under plans of reorganization since they are now divestible by state interpretation in conflict with the letter and spirit of Plans of Reorganization in Bankruptcy.

It is of tremendous importance to stockholders, large and small alike, that the rights of cumulative voting granted by contract to stockholders be protected by this court as a vested property right, so that stockholders like the holders of 93,000 common shares in this case will not again be compelled to risk a lawsuit to preserve their voting rights and thereby waive appraisal, doubtful as it may be as a remedy.

From the sheer monetary point of view, the petitioner and the holders of 93,000 common shares of Hoe have been deprived of property without compensation worth over $1,500,000. This is arrived at as follows:

Considering that there were 95,997 shares of A stock outstanding at the time of the consolidation and that two

shares of new common stock (having a present market value of eight dollars per share), were issued without lawful right, for each A share outstanding, the amount unlawfully taken was $1,535,952.00. If it is impossible to unscramble the omelette, as ruled by the Appellate Division, the common stockholders are clearly entitled to an award of damages for such unlawful taking of their property.

Aside from the frustration of the Plan of Readjustment and the decrees of the United States District Court approving same the testimony showed that $991,000 per year of income (R. 182—1950 as a base) has been taken from common stockholders consisting of upwards of 500 individuals located in every state in the union and distributed to the A stockholders as owners of the newly issued common stock. Shocking as such deprivation of income and principal may be to the individuals involved it is submitted that they can more readily stand the loss to their pocketbooks than the system of justice, which makes it possible, can afford to permit such an unjust judgment to stand. It is respectfully submitted that this court grant a writ of certiorari herein for the purpose of advising the predatory elements in the financial community responsible for these acts that it will not sanction the destruction of vested cumulative voting rights of shareholders by sham and pretend consolidations such as has been sanctioned in this case by the Courts of the State of New York.

Wherefore, it is respectfully submitted that this petition for a writ of certiorari be granted.

GUSTAVE B. GARFIELD,
Attorney for Petitioner.

October 1, 1951.

Appendix.

(1) Petitioner's cumulative voting rights and the source thereof.

On the reverse side of petitioner's and all other common stockholders certificates of stock from February 28, 1947 onward up to and including the filing of the certificate of consolidation on November 29, 1950 was the printed matter defining the voting rights of the respective classes of stock appearing at Record pages 494 to 508 inclusive. In so far as it defines the petitioners cumulative voting rights it is as follows:

"R. HOE & CO., INC.

A STATEMENT OF DESIGNATIONS, PREFERENCES, PRIVILEGES AND VOTING POWERS OF THE CLASS A STOCK, B STOCK AND COMMON STOCK WHICH THE CORPORATION IS AUTHORIZED TO ISSUE AND THE RESTRICTIONS OR QUALIFICATIONS THEREOF FOLLOWS:

In paragraph Fifth, sub. (h) of the said 1947 Certification of Incorporated Consolidation it was provided: "*Continuing until no shares of B Stock shall be deemed to be outstanding, and until all dividends accumulated since October 15, 1946 and unpaid on the Class A stock are paid in full through the last quarterly dividend period, the holders of Class A stock voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of Directors and the holders of the Common Stock, voting cumulatively as a class, shall be entitled to elect and continue in office, the two other members of the Board of Directors*" (R. ~~1512~~). (R. 510)

In paragraph Sixth sub. (k) of the 1947 Certificate of Incorporation and of Consolidation it was provided: "*except with the consent of a majority of the Common Stock, no amendment of the Certificate*

of Incorporation or Certificate of Consolidation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors, from the time such right commences as provided in subparagraph (h) as such Board shall be constituted from time to time" (R. ~~1518~~ 506)

The Plan of Readjustment of R. Hoe & Co., Inc. dated as of January 16, 1935 provided; at page 2 under "Introductory Statement" Paragraph 2:

> "* * * until all the arrearages of dividends on the Class 'A' stock shall have been paid, the Class 'A' stockholders will be entitled to elect nine directors and the common stockholders two directors * * *. *All voting for directors will be cumulative."*

On page 6 of the plan of readjustment, the following provision appears:

> "THE PLAN OF READJUSTMENT
>
> *The Company hereby proposes this Plan for the readjustment of R. Hoe & Co. (herein referred to as the 'Company') and its properties and for the readjustment of the respective interests therein of the holders of securities and obligations of, and claims against, the Company. The Plan and each and every provision thereof is hereby made expressly subject to the provisions of Section 77B of the Bankruptcy Act."*

The provisions of Section 77B (48 Stat. 912) of the *Bankruptcy Act* are as follows:

> "(h) Upon final confirmation of the plan the debtor * * * shall put into effect and carry out the plan

and the orders of the judge relative thereto under and subject to the supervision and control of the judge and the property dealt with by the plan, when transferred and conveyed by the Trustee or Trustees to the debtor * * * shall be free and clear of all claims of the debtor, *its stockholders* and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan or directing such transfer and conveyance or retention * * *. Such final decree shall discharge the debtor from its debts and liabilities, *and shall terminate and end all rights and interests of its stockholders except as provided in the plan or as may be reserved, as aforesaid.*"

"(p) *This section* shall take effect and be in force from and after June 7th, 1934, and *shall apply* as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date, as to debtors, *their stockholders and creditors, whose interests or debts are acquired or incurred after such date.*" (Italics ours.)

The provisions of the Plan of Readjustment which state the time when and the manner in which the holders of the common stock voting cumulatively as a class shall be entitled to elect and continue in office two members of the Board of Directors, are contained in *page 22 of the Plan, Article IV "Miscellaneous Provisions", section "1".* The said section, in substance, provides that upon the termination of the right of the prior preferred stock voting cumulatively to elect six out of the eleven directors, the remaining five being elected by the "A" stockholders voting cumulatively, the right to elect the eleven directors devolves upon the "A" stockholders who are to elect nine directors voting cumulatively, and the common

stockholders who are to elect two directors voting cumulatively. The prior preferred stock, was fully paid off and liquidated in 1946 (Deft. Martin's Exhibit O.-R. 576). This appears from the debtor's Annual Report, in which it is said:

> "For the first time since R. Hoe & Co., Inc. became a publicly-owned enterprise in 1924, *the Company is entirely free of long-term debt and has no bonds, preferred stock or bank loans outstanding.*" • • •
>
> "*Thus, the Class 'A' stock has become the senior security of the Company* • • •".

The exact provision of the Plan of Readjustment vesting in the common stockholders the right to elect two directors, voting cumulatively as a class, is as follows (p. 22):

> "1. The certificate of incorporation and by-laws of the Company shall be amended so as to provide that the Board of Directors of the Company shall consist of eleven members. During the period or periods in which the Prior Preferred stock shall have the right, voting cumulatively, to elect and continue in office six members of the Board of Directors of the Company, the Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office the other five members of the Board. Upon the termination of the right of the Prior preferred stock to elect and continue in office six members of the Board of Directors and continuing until all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period, the holders of the Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the Board of

Directors and *the holders of the common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the Board of Directors.*"

The provisions of the Plan of Readjustment which confer upon the common stockholders the right to take over control of the Company from the "A" directors, which vests them with equal voting privileges on all matters except the election of directors, *and which forbid the amendment of the Certificate of Incorporation without their consent, are contained in the same paragraph "Miscellaneous Provisions", subdivision "1",* and continues as follows:

"After all accumulated and unpaid dividends on the Class 'A' stock are paid in full as aforesaid, the voting rights in respect to directors shall be as now set forth in the certificate of incorporation of the Company, except that at all times the holders of Class 'A' stock, voting cumulatively as a class, shall be entitled to elect and continue in office at least five of the eleven directors.

The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class 'A' stock, except as in Article III hereof specified as to the prior preferred stock and the preferred stock, and except that the common stock voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the company pursuant to Section 105 of the Stock Corporation Law of the State of New York; PROVIDED, HOWEVER, that after all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period and thereafter so long as the Company is not in default in four or more quarterly dividends

on the Class 'A' stock, whether consecutive or not, the common stock voting as a class shall have equal rights with the Class 'A' stock voting as a class on all matters other than the election of directors; *and* PROVIDED, FURTHER *that except with the consent of a majority of the common stock no amendment of the certificate of incorporation shall be made which shall impair the right of the common stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the Class voting rights of the common stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence.*"

(2) The elimination of petitioner's cumulative voting rights as a common stockholder.

In the proposed certificate of consolidation (since acted upon), set forth as Exhibit "A" annexed to the "Proxy Statement", (R. 48) it was provided in *Paragraph "Tenth":*

> "At any meeting of stockholders, each stockholder of record present in person or by proxy and having the right to vote thereat, shall be entitled to one vote for each share of stock with voting power standing in his name on the books of the corporation; AND NO STOCKHOLDER SHALL BE ENTITLED TO VOTE HIS SHARES CUMULATIVELY FOR THE ELECTION OF DIRECTORS."

In the proxy statement itself the President of R. Hoe & Co., Inc. said (p. 5):

> "Attention is called to the fact that upon the effectiveness of the consolidation, no stockholder shall have the right to vote his shares cumulatively for the election of directors."

(3) Extracts from pertinent provisions of the New York State Stock Corporation Law.

§ 86. *Consolidation.* Any two or more domestic business corporations may be consolidated into a single corporation, which may be either a new corporation or any one of the constituent corporations, by the filing of a certificate which shall be entitled and endorsed "Certificate of consolidation of..... and.....into ....., pursuant to section eighty-six of the stock corporation law" (the first blank spaces being filled in with the names of the constituent corporations and the last blank space being filled in with the name of the corporation formed by or which is to survive the consolidation) and which shall set forth:

1. The name of each corporation to be included in the consolidation, and the date of filing its certificate of incorporation in the department of state, or, if any such corporation is created by a special law and has no certificate of incorporation, the chapter number and year of passage of such law. * * *

Such certificate shall be either:

a. *Subscribed and acknowledged, in person or by proxy, by the holders of record of all the outstanding shares* of each constituent corporation entitled to vote thereon, and shall have annexed an affidavit by the secretary or an assistant secretary of each corporation that the persons who have executed the certificate, in person or by proxy, include the holders of record of all of the outstanding *shares of such corporation entitled to vote thereon;* or

b. *Subscribed and acknowledged by the president or a vice-president and the secretary or an assistant secretary of each constituent corporation who shall make and annex*

an affidavit stating that they have been authorized to execute and file such certificate by the votes cast in person or by proxy, of the holders of record of two-thirds of the outstanding shares of such corporation entitled to vote thereon, and that such votes were cast at a stockholders' meeting held upon notice as prescribed in section forty-five of the stock corporation law to every *stockholder of record of the corporation entitled to vote thereon,* and the date of such meeting.

Such certificate shall be filed in the department of state and the secretary of state shall make, certify and transmit a copy thereof to the clerk of the county in which the office of the consolidated corporation is to be located, which copy shall be filed by such clerk.

* * *

Upon the filing of such certificate the certificate of incorporation or special law incorporating any constituent corporation surviving the *consolidation shall be deemed amended* to the extent necessary to bring such certificate of incorporation or special law into conformity with the provisions of the certificate of consolidation.

§ 87. *Rights of dissenting stockholders.* Any stockholder not voting in favor of such consolidation may at any time prior to the vote on such consolidation—or if notice of the meeting to vote on such consolidation was not mailed to him at least twenty days prior to the taking of such vote, then within twenty days after the mailing of such notice—object to such consolidation and demand payment for his stock. Such stockholder or such consolidated corporation shall have the right, subject to the conditions and provisions of section twenty-one to have such stock appraised and paid for as provided in said section. Such objection and demand must be in writing and

filed with the constituent corporation of which he is a stockholder or with the consolidated corporation. If the consent to such consolidation is given in writing without a meeting by the stockholders of any constituent corporation the time of a stockholder of such constituent corporation to file his objection and demand shall expire on the twentieth day after the mailing to such stockholder of a notice setting forth the plan of consolidation and stating that the consent in writing of stockholders entitled to vote thereon of such constituent corporation has been given to such consolidation pursuant to section eighty-six.

SUMMARY OF § 21. *Determination of value of stock of objecting stockholders.*

1. Provides for the making of an offer of purchase by the consolidated corporation to objecting stockholders and since no offer of any kind was made to objecting stockholders in this case, is not applicable.

2. Provides for allocation of assets in the event of such purchase mentioned in 1. above and is not applicable.

3. Provides that if the corporation shall make no offer, either the objecting stockholder or the corporation may apply to the supreme court in the judicial district where the corporation is located to determine the value of such stock. The petition shall be on five days notice and shall be made returnable on the fiftieth day after the last day on which demand might have been made.

4. Provides that the court shall determine the value of the shares and recites that it may appoint an appraiser. The items going the appraisers determination and the procedures for obtaining payment are set forth herein.

5. The costs are to be borne by the corporation except if the corporation makes an offer and it is not accepted "and failure to accept such offer was arbitrary and vexatious and not in good faith."

6. Any stockholder demanding payment ceases to be a stockholder as of the date of such demand except for the purpose of receiving payment for his shares.

7. Payment for shares of objecting stockholders is to be made simultaneously with the surrender of the shares.

8. Each stockholder shall submit his shares for notation indicating that the shares are subject to litigation to determine their value. Upon transfer of shares so stamped the transferee shall have only the rights to receive the value of the shares as determined above.

§ 49. *Cumulative voting.* The certificate of incorporation of any stock corporation or other certificate filed pursuant to law may provide that at all elections of directors of such corporation each stockholder shall be entitled to as many votes as shall equal the number of votes which (except for such provisions as to cumulative voting) he would be entitled to cast for the election of directors with respect to his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them, as he may see fit, which right, when exercised, shall be termed cumulative voting. The stockholders of a corporation heretofore formed, who, by the provisions of laws existing on April thirtieth, eighteen hundred and ninety-one, were entitled to the exercise of such right, may hereafter exercise such right according to the provisions of this section.

Appendix

(4) Opinions below, in chronological order.

(a) *Nathan Katz* v. *R. Hoe & Co. Inc. October 4, 1950, Appellate Division grants a stay of consolidation pending trial of action.*

Supreme Court, Appellate Division, First Department. Oct. 4, 1950. G. B. Garfield, New York City, for Katz. N. P. Cullom, New York City, For R. Hoe & Co. and others. G. C. Baron, New York City, for Martin. In view of the circumstance that this action is scheduled to be tried in the immediate future and the parties having consented on oral argument to an immediate trial, and no substantial prejudice to defendants-respondents being involved and in order to preserve in so far as possible, the status quo, the order appealed from is unanimously modified so as to stay R. Hoe & Co., Inc., its officers, servants and employees, from filing in the office of the Secretary of State the certificate of consolidation of said corporation and Hoe Export-Import Corporation, and from taking any and all other or further proceedings with respect to the consolidation of said corporations or the recapitalization or classification or reclassification of them or either of them, whether pursuant to sections 86 or 35 of the Stock Corporation Law or otherwise, pending the trial and determination of this action, and for at least five days after the entry of final judgment therein and, as so modified, affirmed. Settle order on notice.

(b) *Nathan Katz etc.* v. *R. Hoe & Co., Inc. October 27, 1950 Trial Term New York County Opinion dismissing Second Amended Complaint on the mertis after trial*:

Opinion.

SUPREME COURT OF THE STATE OF NEW YORK,

COUNTY OF NEW YORK,

Trial Term: Part XIV.

NATHAN KATZ, etc.

v.

R. HOE & Co., INC., et al.

COHALAN, J.:

In this action, two common stockholders of the corporate defendant (hereinafter referred to as "Hoe") seek to enjoin a consolidation of Hoe with a wholly-owned subsidiary corporation.

On the day the trial in this case was concluded and when the matter was *sub judice* (the Court awaiting the briefs of the litigants), plaintiff applied to the United States District Court for the Southern District of New York for substantially the same relief he asks in this litigation.

This action necessitates an examination of the question as to whether this Court has jurisdiction of the issues presented here. This question being of basic importance —common courtesy and proper advocacy dictate that it should have been presented directly to this Court, particularly as the issues here had not been finally submitted. It is academic that no Court should proceed in any matter unless and until it has jurisdiction. When the trial opened, it was of record that plaintiff (an attorney) and his counsel had served a complaint and an amended complaint and

had been to the Appellate Division on an appeal from an order of this Court. At the trial they asked and obtained leave to serve and file a second amended complaint. The defendant, Martin, in his answer had asked substantially the same relief as the plaintiff. The plaintiff served his third complaint, Martin served another pleading in which he set up new matter. It follows that there can be no question so far as jurisdiction *in personam* is concerned, these two litigants having on more than one occasion sought relief from this Court in the premises and the defendant having duly appeared. By conducting the trial, they accentuated their selection of the forum to which they had in the first instance appealed. As to jurisdiction *in rem,* it appears that the corporate defendant was created by the laws of the State of New York. Consolidation with another corporation (likewise a New York corporation) is in contemplation. The internal management of such corporations, their rights and powers are set forth in the laws of this state as well as in their charters of incorporation issued under those laws. Accordingly, it is held that this Court has jurisdiction both *in personam* and *in rem* of the parties and the issues here litigated. (*Pennoyer* v. *Neff,* 95 U. S. 714; *Mullane* v. *Central Hanover Trust Company,* 339 U. S. 306; *Matter of Matheson,* 265 N. Y. 81; *Matter of Buckman,* 270 App. Div. 707.)

Proceeding to the mertis of the controversy as submitted at the trial: Hoe underwent a reorganization in the United States Court for this district in 1935. At that time preferred stock was issued to take care of the claims of creditors. Behind this stock there was Class A stock and common stock. As of September 1946, the preferred stock had been paid and was retired. At that time the arrears of dividends on the Class A stock amounted to $83 per share. By means of a consolidation with a wholly-owned subsidiary in 1947, the stock setup was changed so

that thereafter there were three classes of stock, the present A, B stock, and the common. Largely by means of the issuance of the B stock the arrears on the A stock were discharged. At none of the times above mentioned did the common stockholders have the right to vote on the consolidation of Hoe with any other corporation.

Control of the company under that reorganization plan was first in the preferred stockholders and was exercised by cumulative voting for a fixed number of directors (11) 6 to be elected by the preferred stockholders and 5 by the Class A stockholders. Upon the retirement of the preferred stock and the 1947 consolidation, control passed to the A stockholders who then elected 9 of the directors, while common stockholders elected 2. Under this plan, when and if the dividends on the Class A stock were fully paid and the B stock retired, common stockholders would have the right to elect 6 of the 11 directors. As of 1950, a considerable quantity of the B stock amounting to approximately $3,900,000 is still outstanding.

By means of the consolidation now proposed (and which it is sought by this action to enjoin) the B stock is to be retired and only A and common stock will remain. Under this plan, the entire common stock of the consolidated corporations will be placed on an annual dividend basis and a sinking fund set up to retire the Class A stock with the provision that the right of the common to elect directors will increase in proportion to the redemption and retirement of the A stock. The ultimate goal contemplated is to be the creation of a single stock structure. During the period in which these purposes are to be carried out, the A stockholders will elect a majority of the directors.

The present action seeks to enjoin the consolidation on the grounds of fraud and deprivation of the rights of the present common stockholders. It is clear that the con-

solidation as proposed is not illegal. It is equally clear that by the terms of the certificate of incorporation and the plans in existence as of 1950, the present common stockholders have no right to vote on the proposed consolidation. A point is made that what is being accomplished through the guise of a consolidation is, in effect, a recapitalization and that under § 35 of the Stock Corporation Law, any provision in the certificate of incorporation to the contrary notwithstanding, all the stockholders have the right to be heard.

On the submitted evidence, this Court is unwilling to hold that the consolidation is a ruse by means of which the provisions of § 35 are being avoided. There has been no showing of fraud and while a serious effort has been made to show that the plan will not be beneficial to the corporation itself and will be harmful to the common stockholders, such a showing has not been made and no basis has been presented which would justify this Court in exercising its visitorial powers.

It should always be borne in mind in these cases that the Court, in the absence of a very plain showing of either fraud or improvidence, will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature. (*Zobel* v. *American Locomotive Company,* 182 Misc. 323; *Turner* v. *The American Metal Company,* 268 App. Div. 239.)

If any of the common stockholders are of the opinion that their interests will be damaged by the proposed consolidation they have an adequate remedy under § 21 of the Stock Corporation Law. In *Anderson* v. *International Minerals & Chemical Corp.,* 295 N. Y. 343, the Court states: "If proceeding in accordance with the statute a consolidation is duly consummated there are but two alternative rights which survive to the holders of the old

shares: to take the new shares under the terms and conditions of consolidation or to take the value of the old shares determined in accordance with § 21." See also, *Beloff* v. *Consolidated Edison Company*, 300 N. Y. 11.

The complaint and cross-complaint are accordingly dismissed without costs.

This is intended to be the decision of the Court and the parties are directed to settle judgment on notice.

DENIS O'L. COHALAN
J. S. C.

Dated: October 27, 1950.

(c) *Memorandum opinion, John F. X. McGohey, D. J. in companion case November 6, 1950.*

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In the Matter

of

R. HOE & Co., INC.,

Debtor.

In Bankruptcy No. 60162

McGOHEY, D. J.

The proceedings for the reorganization of the debtor were terminated by order of July 10, 1935. It was thereby adjudged that the debtor be discharged and that it be revested with its properties. The petitioner concededly was not a stockholder at the time of the reorganization proceedings. He purchased his 500 shares on December 23, 1949, just about the time the debtor was about to effect a consolidation pursuant to the New York Stock Corporation Law. The petitioner undertook to prevent the consolidation. He seemed to realize, correctly, that his recourse had to be to the state court to seek injunction against possible violation of the local law, rather than to seek relief here under the theory he now advances. He did institute an action in New York. A temporary injunction was there denied and, after a prompt trial, judgment was entered against him. While the matter was awaiting decision by Mr. Justice Cohalan, and without advising him, this petition was filed here. It seeks the identical relief prayed for in the state court action. The only thing dif-

ferent here is the theory. It is here claimed that petitioner is proceeding under the "reserved jurisdiction" of the bankruptcy court, to enjoin alleged disobedience of the reorganization plan.

It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep "leading strings"[1] on or be a "nurse"[2] to reorganized concerns. This reorganized debtor was in 1935 sent "out into the state as fully subject to state law as though this court had nothing to do with its creation."[3] The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court.[4] A less worthy appeal to the court's equity power is impossible to imagine.

The petition for injunction is in all respects denied.

Submit order.

Dated: New York, N. Y., November 6, 1950.

John F. X. McGohey,
JOHN F. X. McGOHEY,
U. S. D. J.

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[1] *In re Flatbush Ave.-Nevins St. Corp.*, 2 Cir., 133 F. 2d 760.

[2] *North American Car Corp.* v. *Peerless W. & V. Mach. Corp.*, 2 Cir., 143 F. 2d 938.

[3] *In re Ambassador Hotel Corp.*, 2 Cir., 124 F. 2d 435.

[4] *Davega-City Radio, Inc.* v. *Boland*, S. D. N. Y., 23 F. Supp. 969, 970.

(d) *Nathan Katz* v. *R. Hoe & Co. Inc. April 25, 1951. Appellate Division opinion on affirmance of Justice Cohalan's judgment of dismissal and order denying motion for a new trial.*

Per Curiam. This action by a holder of common stock of a corporation claiming to sue on behalf of himself and all other common stockholders, was instituted primarily for an injunction to restrain a corporate consolidation. Months before the appeal was heard, the consolidation had been fully consummated and the stock of the corporation reissued in accordance therewith, after plenary trial in which Special Term had entered judgment in defendant's favor dismissing the complaint on the merits.

Relief was also sought on the ground of fraud but the evidence supports the trial court's finding that there was no fraud.

The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties; a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings.

Under the state of facts disclosed, the judgment in favor of defendants-respondents dismissing the complaint and cross complaint, and the order denying plaintiff's motion for a new trial, should be affirmed.

OCT 26
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF OF RESPONDENTS IN OPPOSITION

NEIL P. CULLOM,
Counsel for Respondents.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6

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IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

v.

R. HOE & CO., INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF OF RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the trial court (R. 650-654) is reported at 199 Misc. 459, aff'd 278 App. Div. 766, motion for leave to appeal denied 302 N. Y. ——. The opinion of Special Term denying motion for temporary injunction is reported at 99 N. Y. Supp. 2nd 899, aff'd 277 App. Div. 966. The opinion of the United States District Court for the Southern District of New York in a suit for the same relief between the same parties is reported at 93 F. Supp. 762, appeal dismissed 186 F. 2d 716.

Jurisdiction

Jurisdictional requisites are lacking.

Question Presented

Whether a single stockholder owning 3/1000ths of one issue of stock can enjoin a consolidation, under section 86 of the New York Stock Corporation Law, between respondent and its subsidiary, which has already been fully consummated, in view of the findings of all of the state and Federal courts which passed on the case, that petitioner's contentions that the consolidation was fraudulent, illegal, involved the denial of his right to vote thereon, was unfair, that the court should substitute its judgment for that of the directors as to the economic wisdom of the plan and that petitioner had no adequate remedy at law, are groundless.

Statute Involved

Section 86 of the New York Stock Corporation Law.

Statement

This brief is submitted in behalf of defendants-respondents in opposition to petition of plaintiff-petitioner for a writ of certiorari to the New York Supreme Court, Appellate Division, First Department. The judgment of the Supreme Court, New York County, now under attack, was entered April 27, 1951 upon an order of the Appellate Division, First Department, which unanimously affirmed the judment of the Supreme Court, dismissing the complaint on the merits (R. 47, 48).

The suit was brought in equity to restrain R. Hoe & Co., Inc., a New York corporation, hereinafter referred to as "Hoe", its directors and officers, from holding a meeting of Class A stockholders on September 12, 1950 to vote upon a proposed consolidation under section 86, Stock Corporation Law, with its wholly owned subsidiary, Hoe Export-Import Corporation; and thereafter from consummating the consolidation. A tax free exchange of securities, the plan resulted in a much-needed simplification of the corporate structure. For details of the plan see pages 9-10, *post*. No pecuniary or any other benefit accrued to any officer or director of the company as the result of this consolidation.

The gravamen of petitioner's alleged grievance is that defendants "fraudulently deprived the common stockholders of their right to vote on the consolidation." No such right ever existed and all the courts which have passed upon this question have unanimously so held. The company's charter (Martin's Ex. A 5(k)—R. 506) provides:

> "The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class A stock except that the Common stock, voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the Corporation pursuant to Section 105 of the Stock Corporation Law of the State of New York and shall be specifically excluded from the right to vote in a proceeding * * * *for establishing priorities or creating preferences among the several classes of stock pursuant to Section 36* (now 35); * * *
>
> *"for consolidation pursuant to Section 86 of the Stock Corporation Law* * * *."

The above provisions are deliberately omitted from the statement of "voting rights of the common stock" in the appendix to petitioner's brief (pp. 37, 38).

Status of the Parties

It is significant that the consolidation is not challenged by the holders of any of the 95,997 shares of Class A stock, the 194,767 shares of B stock or the 160,000 shares of common stock, except Katz. He acquired record title to 500 shares of common stock out of 160,000 shares, or 3/1000ths of the issue (last in the order of seniority) on December 23, 1949 at about the time when a readjustment of Hoe's capital structure was under consideration. Another common stockholder, one Martin, originally joined him, but has abandoned the suit.

Status of the Consolidation

The Class A stockholders meeting was held on September 12, 1950 and the consolidation approved by a vote of 77% of the issued and outstanding stock (R. 260). After a plenary trial at Special Term the complaint was dismissed on the merits (*Katz* v. *Hoe,* 199 Misc. 459); and that judgment was unanimously affirmed by the Appellate Division (278 App. Div. 766).

After the Appellate Division had denied petitioner's application for a stay pending appeal, the consolidation was fully consummated on November 29, 1950 by the filing of the required certificate with the Department of State of the State of New York; and pursuant thereto new securities, in exchange for the old, of a current market value of upwards of $10,000,000 have been issued and dividends declared and paid thereon. These securities have been bought, sold and traded in on the New York Curb Exchange and over-the-counter; and the rights of the holders thereof have become vested.

Prior Proceedings

Petitioner applied for a temporary injunction which was denied on the following grounds (99 N. Y. Supp. 2d 899):

> (1) That a consolidation by one corporation with its wholly owned subsidiary is legal;
>
> (2) That the right of appraisal under sections 87 and 21 of the Stock Corporation Law, if not an exclusive remedy, "eliminates any contention of irreparable injury and lack of an adequate remedy at law"; and
>
> (3) That a balancing of equities "is clearly in favor of the defendant".

The order was unanimously affirmed (277 App. Div. 966).

When the case was *sub judice* before Mr. Justice COHALAN, surreptitiously and without informing him, Katz, this petitioner, brought suit in the United States District Court for the Southern District of New York for identically the same relief and on the same grounds. His petition there was dismissed, the court holding (93 F. Supp. 762):

> "A less worthy appeal to the court's equity power is impossible to imagine."

After the consolidation had been consummated, a motion to dismiss the appeal was made by respondent herein. That motion was granted, the appeal dismissed, and rehearing denied by the United States Court of Appeals, Second Circuit (*In the Matter of R. Hoe & Co., Inc.*, 186 F. 2d 716). This proceeding will be discussed at pages 17-22, *post*.

The Pleadings

Petitioner served three different complaints all in a period of six weeks, in a confused and desperate attempt to discover some theory upon which liability could be fastened upon defendants.

The second amended complaint alleged that by virtue of certain orders issued in the receivership proceeding of 1935, wherein Hoe was the debtor, the common stock was entitled to vote on the consolidation; that the organization of the subsidiary and the consolidation therewith were illegal, "fraudulent and ill-conceived". The prayer for relief was for an injunction restraining Hoe from holding the meeting on September 12, 1950 and for judgment *"declaring the meeting,"* if held, void (R. 15).

The following very significant admissions under oath were made at various times by petitioner in his formal pleadings. In the original complaint verified by Katz on August 17, 1950 and in the first amended complaint verified by his attorney, Gustave B. Garfield, on August 28, 1950, it is alleged (R. 647):

> "That the certificate of incorporation of said corporate defendant provides, that the holders of the B stock and common stock thereof, shall be specifically excluded from the right to vote in a proceeding for consolidation pursuant to Section 86 of the Stock Corporation Law."

The answer of respondents (after admitting the foregoing allegation) is, in effect, a general denial and pleads by way of affirmative defense that plaintiffs have an adequate remedy at law (R. 31, 32).

The Extraordinary Limitations and Restrictions Imposed Upon the Common Stock by the Federal Court Receivership

The common stock (true, only a *de minimus* splinter) now claiming the veto power over this consolidation has an interesting background. Historically, it appears that the A stock contributed the bulk of the capital of the corporation and that the common stock, in large part, was issued to promoters who paid nothing therefor and provided no capital.

In 1932 the company was petitioned into an equity receivership in the United States District Court for the Southern District of New York from which it emerged in 1935 with a plan of adjustment, approved by the District Court, which included the certificate of incorporation, as amended, containing the provisions set forth below. These provisions existed as of the date of this consolidation.

As of September 30, 1935, the debt and equity issues, eight in number, senior to common stock amounted to $15,621,916.36 and the per share deficit of common stock at that time was $56.51 (Hoe's Ex. AU). This explains, in part, the following most unusual and extraordinary restrictions and limitations upon the common stock. Section 5 (k) of the company's charter, as amended, provides (Ex. A to Pl. Ex. 4—R. 466, 506):

> "(k) The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of the Class A stock except that the Common stock, voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the Corporation pursuant to Section 105 of the Stock Corporation Law of the State of New York; and

"Shall be specifically excluded from the right to vote in a proceeding;

"For mortgaging the property and franchises of the Corporation pursuant to Section 16;

"For guaranteeing the bonds of another corporation pursuant to Section 19;

"For sale of the franchises and property pursuant to Section 20;

"*For establishing priorities or creating preferences among the several classes of stock pursuant to Section 36* (now 35);

"*For consolidation pursuant to Section 86 of the Stock Corporation Law;* or

"For change of name pursuant to the General Corporation Law; * * *"

It thus appears that not only were all voting rights (with immaterial exceptions) vested in Class A stock but the common stock was "specifically excluded" from voting on a consolidation pursuant to section 86, as well as from the right to vote "for establishing priorities or creating preferences" pursuant to section 36, now 35.

It is also of vital significance that prior to the receivership under the company's charter the common stock could not be increased beyond 160,000 shares or any of its provisions changed, without the consent of two-thirds of the common (R. 592). In the plan approved by the Federal court this provision was entirely eliminated and there remained no prohibition against dilution of the common stock or the change of any of its provisions, without its consent (Ex. A to Pl. Ex. 4—R. 466).

This common stock was not really a stock—it was actually only a warrant. It had no claim then or in the foreseeable future on assets or earnings. It simply represented,

as petitioner's expert admitted, "a hope for better things" (R. 201).

In contrast every pre-emptive right was granted to the Class A stock, including the right to elect nine directors, the right to receive $4 annual cumulative dividends, to receive $65 per share on voluntary liquidation and $60 per share on involuntary liquidation and to participate in dividends in excess of $4 (Ex. A to Pl. Ex. 4—5(k)—R. 466).

As of June 30, 1950 the net asset value per share of Class A stock was $72.87 (R. 641) and the per share net deficit of the common was $19.62 (R. 332).

Prior to this consolidation no dividends could be paid to the common stock until the B stock is entirely eliminated and all dividends on the Class A stock are current. There were outstanding 194,767 shares of B stock, callable at $20 per share (R. 19). The right to dividends might have been deferred for an indeterminate number of years.

Advantages of the Plan to the Common Stock

The plan represented management's effort to reconcile the conflicting interests of Hoe's three classes of securities, without the creation of debt. To accomplish this, it was necessary for each class of stock to give up certain rights and to accept other rights in lieu thereof. Under the plan the A stock was diluted to the extent of 20.2% in assets and earnings (R. 364) or a per share dilution in net asset coverage of $19.57 per share and a dilution in earnings of $4.20 per share (R. 641). The B stock instead of receiving $20 per share, received the equivalent of about $13 (the present value of $20, discounted at 6%, seven years hence) (R. 368). The objectives of the plan and the benefits conferred thereby on the common stock were:

1. *Elimination of the B stock constituting a claim on assets of $3,900,000 senior to the common stock.* This likewise involved the elimination of the B stock redemption fund which had, during the three fiscal years 1947-1949, constituted a drain on earnings of $626,000 per annum.

2. *The consolidation not only eliminated the B stock immediately but will ultimately, through the operation of the sinking fund, eliminate the A stock.* Upon the basis of the new capitalization, the common stock will then be the only surviving stock, with full rights of ownership and voting control.

3. *Immediate establishment of the common stock on a dividend basis (for the first time in the history of the company).* Under the company's old charter, no dividends could be paid on the common stock until the elimination of the $3,900,000 of B stock. Dividends were declared and paid on this stock on January 15, 1951, April 15, 1951, July 15, 1951 and October 15, 1951.

4. *Elimination of A stock dividend participation.* Under the old charter, after the payment of dividends of $4 per annum on Class A stock and $1 per share on the old common stock, Class A participated to the extent of one-third of additional dividends up to $7 per share. Under the plan of consolidation this right of the Class A stock was eliminated.

5. *Elimination of cumulative voting.* This system of voting had been extremely costly to the company; it had enabled market raiders and stock speculators to force their way on the board (R. 529-531, 528); and its elimination, in the opinion of the directors, will have a tendency to discourage, if not eliminate, recurrent attacks by self-seeking pressure groups, with resultant costly and damaging effects upon the company's customer, competitor and personnel relations.

No one can deny that the foregoing constitute very real, present and substantial benefits to the common stock. The trial judge so found (R. 652, 653).

The Opinion of the Trial Court

The learned trial judge, in an opinion notable for its clarity and accuracy, held: (1) that there was no proof of fraud or illegality; (2) that the consolidation was not a "subterfuge" or "ruse" to avoid the provisions of section 35, Stock Corporation Law; (3) that section 51, Stock Corporation Law, was inapplicable; (4) that the common stock had no right to vote on the consolidation; and (5) that plaintiffs have an adequate remedy at law (R. 650-654).

The Appellate Division unanimously "in all things affirmed" these findings of fact, conclusions of law and the judgment based thereon (R. 665, 666). In a *per curiam* opinion the court, after pointing out that the suit was "instituted primarily for an injunction", that the consolidation had been fully consummated and securities issued thereunder, said:

> "Relief was also sought on the ground of fraud but the evidence supports the trial court's finding that there was no fraud.
>
> "The action is in equity. As a result of the consummated consolidation, rights have accrued to third parties; a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action, joined only by defendant Martin, another common stockholder and also a director. Great numbers of the class plaintiff presumes to represent have exchanged their shares in accordance with the executed and completed plan of consolidation or had previously petitioned for an appraisal of their stockholdings."

The court made pointed reference to the fact that plaintiff was "*claiming* to sue on behalf of himself and other common stockholders" and that "great numbers of the class plaintiff *presumes* to represent" have exchanged their

shares or sought appraisal. The court thus put its finger squarely on the lack of equity of Katz' position in trying to veto the consolidation with a bare 500 shares of common stock.

The Issue

The following facts are now finally conceded:

Petitioner, in his brief before the Appellate Division stated that the consolidation by a corporation with its wholly owned subsidiary is "entirely legal."

All parties agree that the present charter of the corporation provides that the common stock "shall be specifically excluded from the right to vote in a proceeding for consolidation pursuant to section 86 of the Stock Corporation Law" (R. 647); and that except for the right to elect two directors and to vote on voluntary dissolution, common stockholders "have no voting rights of any kind whatever" (R. 647).

The entire case therefore comes down to this simple proposition: Petitioner contends that there are two permissible alternatives, *i. e.*, recapitalization through a consolidation under section 86; or by amendment under section 35 (the common stock had renounced its right to vote on either); and that defendants chose the former rather than the latter which petitioner prefers; *ergo*, fraud. Respondents on the other hand, contend that there was no legal compulsion to select the latter alternative, and that, in fact, all the existing equities in the case required the selection of the former. The per share net asset value of the A stock being $72.87 and the per share *net deficit* of the common being $19.62, it would have been a gross betrayal of trust for the directors to have countenanced any scheme which would transfer voting control and from 40%

to 60% of the company's equity, from the owners of the company, the A stock, to the common stock.

With the issue thus clearly defined, there can be, we submit, but one answer, viz., that defendants were entirely within their rights, legal and moral, in adopting the consolidation process.

Argument

The issue in the present case is uniquely narrow, and no amount of strained semantics can convert it into one warranting review by this court on certiorari.

As we shall presently demonstrate, there are no Constitutional or Federal questions in this case. It involves, at most, $4,000. It is of utterly no importance to the jurisprudence of the country and represents only one man's efforts to defeat a recapitalization which has been overwhelmingly approved by the stockholders. This court has no jurisdiction of the controversy. It can be said, with little fear of contradiction, that of all the frivolous and unmeritorious petitions for a writ which have ever been presented to this court, the instant application heads the list. In fact, it is so frivolous and devoid of merit that the conclusion is inescapable that it constitutes an effort to harass, annoy and cause expense, rather than reflecting real hope that the petition will be granted. So viewed, it is a clear abuse of the court's process. Not only has petitioner gone far outside the record but he and his counsel have even gone to the extreme of manufacturing out of whole cloth a quotation from Wormser on The Disregard of the Corporate Fiction (p. 18). The language there attributed to Wormser was never uttered by him.

Moreover, we challenge the authority of Mr. Garfield to file this petition on behalf of the petitioner. "An attorney's power to represent a party to an action which he has

instituted ceases upon the entry of final judgment and the issuance of execution thereon, unless his authority is extended by special agreement" (*Weiner* v. *Jones*, 245 App. Div. 17, 18; *Conklin* v. *Conklin*, 133 *id.* 743). There is no evidence that petitioner even knows that this application is being made or that he is now a *bona fide* beneficial, owner of Hoe stock.

I

The petition should be denied because the writ prayed for would not issue to the court of last resort of the State of New York as required by Section 237 of the Judicial Code.

The jurisdictional statute permitting this court to review state court cases either by appeal or by certiorari relates only to final judgments and decrees rendered "by the highest court of the state in which a decision can be had" (28 U. S. C. 1257).

Section 588 of the New York Civil Practice Act provides:

> "APPEAL AS OF RIGHT.
>
> Appeal to the court of appeals as of right lies only
>
> 1. from a judgment or order of the appellate division, provided that the judgment finally determine an action, or the order finally determine a special proceeding, which action or proceeding was originally commenced in the supreme court, a county court, a surrogate's court, the court of claims, or an administrative agency; and provided further that
>
> (a) there be directly involved the construction of the constitution of the state or of the United States;"

On April 25, 1951 the Appellate Division unanimously affirmed the judgment of the trial court (*Katz* v. *Hoe*, 278

App. Div. 766); and copy of the judgment entered upon such affirmance, with notice of entry, was duly served on petitioner's attorney on April 27, 1951. Assuming, *arguendo,* that the constitutional and Federal questions now sought to be asserted by petitioner were properly reserved, he had an absolute right to appeal directly to the Court of Appeals. He took no such appeal and the time so to do has expired. Instead, he applied to the Court of Appeals for leave to appeal and that application was denied on July 11, 1951. Petitioner thereby unequivocally conceded that there is no constitutional question in the case; but, in any event, it is clear that he did not exhaust his remedy before the state court and for that reason this court is without jurisdiction.

In *Southern Electric Co.* v. *Beha,* 269 U. S. 186, 70 L. Ed. 227 this precise question was raised and decided. There it was held that a writ of error to review the decision of the appellate division, which involved denial of a right claimed under the Federal Constitution, will be dismissed where under the state law (N. Y.) an appeal from the denial lay directly to the Court of Appeals, but instead of taking such appeal, petitioner unsuccessfully attempted to have the appellate division certify a question to the Court of Appeals. Mr. Chief Justice TAFT, writing for the unanimous court, said (p. 188):

> "The disallowance was approved by the supreme court and on appeal was taken to the appellate division which affirmed the order of the special term. The claimant then moved for leave to appeal to the court of appeals, and that motion was denied by the appellate division. It is from the order of the appellate division affirming the report of the superintendent of insurance disallowing the claim that this writ of error is taken."

The court stated that the petitioner had properly maintained both in the lower court and in the appellate division

that disallowance of the claim was a denial of full faith and credit, in violation of article 4, section 1 of the Federal Constitution, and that section 63 of the New York Insurance Law was in violation of the 14th Amendment.

Respondent made a motion to dismiss the writ of error on the ground "that it has not issued to the court of last resort of the state of New York as required by section 237 of the Judicial Code". The court said (p. 189):

> "By the first paragraph of section 588 of the Civil Practice Act of New York, an appeal to the court of appeals may be taken as of right from a judgment or order entered upon the decision of the appellate division which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the state or of the United States. In this case there is directly involved the construction of the Constitution of the United States, and therefore it would seem that an appeal could have been taken from the appellate division as of right to the court of appeals, but this was not done. Instead, application was made to the appellate division to certify that a question of law was involved in the case which ought to be reviewed by the court of appeals, and that certificate the appellate division declined."

The court pointed out that in another phase of the same case a direct appeal had been taken from the appellate division to the court of appeals under the first paragraph of section 588 of the Civil Practice Act and said (p. 190):

> "This was not by permission of the appellate division and must therefore have been found by the court of appeals to be within the fourth paragraph of section 588, an order upon a decision of the appellate division 'finally determining an action or special proceeding.' This clearly shows that in the view of the court of appeals of New York if the order of disallowance in this case involved a Federal

constitutional question as it did on this record, it was directly appealable to that court from the appellate division under the first paragraph of section 588. The claimant has failed to make proper application to the state court of final resort and for that reason the writ must be dismissed."

II

Precisely the same Federal questions sought to be raised now have all been adjudicated adversely to petitioner in a suit brought by him, during the pendency of the case at bar, in the Federal court; and the decision of that court is *res judicata.*

During the pendency of the case at bar, petitioner surreptitiously brought a second suit against the same parties for identically the same relief in the United States District Court for the Southern District of New York. His insatiable appetite for litigation and his desire to harass and annoy would not permit him to await the decision in the state court where he had represented that "irreparable damage" would follow unless that court granted an injunction.

The trial judge in this case said (R. 650):

> "On the day the trial in this case was concluded and when the matter was *sub judice* (the court awaiting the briefs of the litigants), plaintiff applied to the United States District Court for the Southern District of New York for substantially the same relief he asks in this litigation."

The court commented upon the fact that "common courtesy and proper advocacy dictate that it should have been presented to this court, particularly as the issues here had not been finally submitted."

The alleged Federal questions now urged by petitioner and enumerated at pages 6 and 7 of the petition are identically the same as those urged before the Federal court. There it was argued that the consolidation violates the plan of reorganization approved by the Federal court in the Hoe 77B proceedings of 1935—or, to state it differently, that the certificate of incorporation, as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means. To state the claim is to answer it.

The petitioner also contended that the proposed consolidation was in violation of his right to vote cumulatively and his other "vested rights" and that *Stoll* v. *Gottlieb*, 305 U. S. 165 had been ignored. All of these contentions were dismissed and the judgment of the Federal court is, of course, *res judicata*.

The District court dismissed the petition on November 6, 1950, stating (*In re Hoe & Co., Inc.*, 93 F. Supp. 762):

> "A less worthy appeal to the court's equity power is impossible to imagine."

The opinion follows:

> "The proceedings for the reorganization of the debtor were terminated by order of July 10, 1935. It was thereby adjudged that the debtor be discharged and that it be revested with its properties. The petitioner concededly was not a stockholder at the time of the reorganization proceedings. He purchased his 500 shares on December 23, 1949, just about the time the debtor was about to effect a consolidation pursuant to the New York Stock Corporation Law, Mck. Consol. Laws, c 59. The petitioner undertook to prevent the consolidation. He seemed to realize, correctly, that his recourse had to be to the state court to seek injunction against possible violation of the local law, rather than to seek relief here

under the theory he now advances. He did institute an action in New York. A temporary injunction was there denied and, after a prompt trial, judgment was entered against him. While the matter was awaiting decision by Mr. Justice Cohalan, and without advising him, this petition was filed here. It seeks the identical relief prayed for in the state court action. The only thing different here is the theory. It is here claimed that petitioner is proceeding under the 'reserved jurisdiction' of the bankruptcy court, to enjoin alleged disobedience of the reorganization plan.

"It is well settled that the bankruptcy court should not and indeed cannot indefinitely keep 'leading strings'[1] on or be a 'nurse'[2] to reorganized concerns. This reorganized debtor was in 1935 sent 'out into the state as fully subject to state law as though the court had had nothing to do with its creation.'[3] The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court.[4] A less worthy appeal to the court's equity power is impossible to imagine.

The petition for injunction is in all respects denied."

The petitioner appealed and his appeal was dismissed on January 12, 1951; and rehearing denied on February 7, 1951 (*In re R. Hoe & Co., Inc.*, 186 F. 2d 716).

The order of the District court was duly served on petitioner's attorney on November 15, 1950; the order of the United States Court of Appeals dismissing the appeal on January 15, 1951; and the order on mandate, on February 14, 1951.

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1. *In re Flatbush Ave.-Nevins St. Corp.*, 2 Cir., 133 F. 2d. 760.

2. *North American Car Corp.* v. *Peerless W. & V. Mach. Corp.*, 2 Cir., 143 F. 2d 938.

3. *In re Ambassador Hotel Corp.*, 2 Cir., 124 F. 2d 435, 437.

4. *Davega-City Radio, Inc.* v. *Boland*, D. C. S. D. N. Y., 23 F. Supp. 969, 970.

Petitioner did not appeal to this court and did not file a petition for a writ of certiorari and his time so to do has expired. In his petition for rehearing, verified January 15, 1951, petitioner states: "If such is in fact the case (if the appeal was dismissed as moot) then the record made in this court is adequate to have the United States Supreme Court pass upon the matter by writ of certiorari".

Having abandoned any rights which he might have had to petition this court for certiorari, the ruling of the district court on the alleged Federal questions now sought to be presented became the law of the case and petitioner cannot, by his petition in the case at bar, accomplish by indirection what he cannot do directly, *i.e.*, overthrow or reverse the judgment of the district court which has become final. He cannot now relitigate questions already adjudicated.

It is clear that the foregoing decisions have resulted in conclusive and final adjudication of the alleged Federal questions now sought to be presented, adversely to petitioner. If viewed, however, as a matter of first impression, it is clear that petitioner's contention is utterly devoid of merit.

The plan of readjustment in the Federal Court was effected by the filing of the certificate of amendment to the certificate of incorporation of the debtor in the form approved by the order of the district court dated May 15, 1935 (R. 465); by paragraph 6 of the order of said court, dated June 25, 1935 (R. 449), the court found that said filing had been consented to by the required votes of Class A and common stockholders and that the same had been duly filed as required by law; paragraph 17 of said order provided (R. 460):

> "This court finds that all of the proceedings of the debtor since the entry of the order of this court

confirming said plan had been in conformity with the plan and with said order and with the requirements of section 77 B.

"To the extent, if any, that the instruments, steps or proceedings approved or authorized by this order or any order previously entered herein shall involve or result in any changes or modifications in the plan, such changes and modifications are hereby approved; and none of such modifications and changes, in the opinion of the court, and the court hereby finds and determines that none of such changes and modifications, is materially adverse to the interest of any creditor or stockholder."

By said order it was adjudged that on and after July 1, 1935 "the possession by the debtor of its assets and operation by it of its business shall be free from the control of this court, except insofar as may be necessary or proper in order to complete the carrying out and putting into effect of the Plan" (R. 454).

By order dated July 10, 1935, the court adjudged that the plan had been consummated and that the proceedings for the reorganization of the debtor had terminated; and said order, among other things, provided:

"2. The Debtor is hereby discharged from its debts and liabilities, and all rights and interests of its stockholders are terminated, except as provided in said Plan or as reserved by order of this Court, dated June 25, 1935, revesting in the Debtor, the assets and properties held by Irving Trust Company, as Trustee of the estate of the Debtor."

The Certificate of Increase of Shares under Section 36 (R. 466) became the company's charter "as fully subject to state laws as though the court had had nothing to do with its creation" (*In Re Ambassador Hotel Corp.*, 2 Cir. 124 F. 2d 435, 437). That certificate provided that the common

stock should be "specifically excluded from voting in any proceeding for

> establishing priorities or creating preferences among the several classes of stock pursuant to Section 36;
>
> consolidation pursuant to Section 86 of the Stock Corporation Law * * *."

The above provisions remained unchanged until the consolidation here under review.

III

The judgment of the lower court rests upon non-Federal grounds which are adequate to support it.

The suit was brought to enjoin a consolidation, under section 86 of the New York Stock Corporation Law, of R. Hoe & Co., Inc. with a subsidiary. The complaint alleges that the proposed consolidation was "fraudulent" and "illegal" in that it "denied the common stockholders the right to vote on the consolidation"; that it was "unfair" to the common stockholders in that it failed to accord to them a proper share of the equity; that the consolidation was the result of "an unlawful and fraudulent scheme, plan and conspiracy"; and that it constituted a violation of the orders of the Federal court in the plan of reorganization of 1935 (R. 9-16).

These allegations were denied by defendants (R. 30, 31).

The case proceeded to trial upon the issues thus framed and the trial court's decision is based upon the following non-Federal grounds (R. 651-654):

1. There was no proof of fraud;

2. Under the terms of the company's charter, "the present common stockholders have no right to vote on the proposed consolidation";

3. There was no "ruse" or subterfuge "by means of which the provisions of section 35 are being avoided";

4. There was a complete failure of proof as to any unfairness to the common stock;

5. That it is settled law of this state that "in the absence of a very plain showing of either fraud or improvidence" the court "will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature".

6. That under the law of New York (section 21, Stock Corporation Law) plaintiffs have an adequate remedy at law in the form of appraisal.

This court has made it crystal clear that "the conditions under which corporations shall organize and operate are matters within the exclusive province of the state, so long as those conditions do not clash with the National Constitution." *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 535, 85 L. Ed. 322, 325.

In *Fox Film Corporation* v. *Muller*, 296 U. S. 207, 80 L. Ed. 158 this court stated that it would not attempt to decide whether a Federal question was involved in the determination of the lower court, in respect of which the parties sharply differed, and then proceeded to hold that where the non-Federal ground of the decision was adequate to support the judgment, this Court lacks jurisdiction, saying (p. 210):

> "We do not attempt to settle the dispute; but, assuming for present purposes only that petitioner's view is the correct one, the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. This rule had become firmly fixed at least as early as *Klinger* v. *Missouri*, 13 Wall. 257, 263, 20 L.

ed. 635, 637, and has been reiterated in a long line of cases since that time." (Citing numerous authorities.)

The opinion continued (p. 211):

> "The construction put upon the contracts did not constitute a preliminary step which simply had the effect of bringing forward for determination the federal question, but was a decision which automatically took the federal question out of the case if otherwise it would be there. The non-federal question in respect of the construction of the contracts and the federal question in respect of their validity under the Anti-trust Act were clearly independent of one another. See *Allen* v. *Southern P. R. Co.*, 173 U. S. 479, 489-492, 43 L. ed. 775, 778, 779, 19 S. Ct. 518. The case, in effect, was disposed of before the federal question said to be involved was reached. *Chouteau* v. *Gibson*, 111 U. S. 200, 28 L. ed. 400, 4 S. Ct. 340; *Chapman* v. *Goodnow* (Chapman v. Crane), 123 U. S. 540, 548, 31 L. ed. 236, 238, 8 S. Ct. 211. A decision of that question then became unnecessary; and whether it was decided or not, our want of jurisdiction is clear.
>
> Writ dismissed for want of jurisdiction."

In *Wood* v. *Cheeseborough*, 228 U. S. 672, 57 L. Ed. 1018, the court, overruling a contention that if there be questions both of Federal and local law in a case, this court may entertain jurisdiction, said (p. 677):

> "This is in effect saying that in all cases, if there be local and federal questions, we may pass upon both and reverse the state court upon both. And yet, it is well established that if there be federal and non-federal grounds and the latter be sufficient to support the judgment of the state court, there can be no review by this court."

In *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, 61 L. ed. 1229, the court held that where a statutory consolidation is attacked on the ground of fraud, when such

charge fails, "the asserted constitutional question ought not to be considered", saying (p. 411):

> "Upon this conclusion the judgment of the district court might well be affirmed, for the reason that where fraud is charged in a bill or set up in an answer, and is denied, the party making the charge will be confined to that issue, and also for the reason that where the claimed constitutional question on which a direct appeal to this court is based is pleaded as resulting from the carrying into effect of a fraudulent scheme, when such charge of fraud fails, the asserted constitutional question ought not to be considered."

IV

No Federal questions are saved for review; and petitioner's failure to urge the same before the trial court, the Appellate Division and the Court of Appeals constitutes a waiver and an abandonment thereof.

The "three principal Federal questions" asserted by petitioner are stated at pages 6 and 7 of the petition as follows:

> "1. *Deprivation of cumulative and other voting rights.*
>
> Whether it is a deprivation of the property of the common stockholders of Hoe in violation of the Fifth and Fourteenth amendments of the United States Constitution to disfranchise them of and abrogate their right to cumulative voting in the election of directors and other voting rights in *contravention of the explicit provisions* of their stock certificates and Hoe's corporate charter?"

As we have shown, there has been no deprivation of the rights of the common stock to vote "in contravention of the explicit provisions of their stock certificates and Hoe's corporate charter" or otherwise. On the contrary,

the common stock renounced, waived and abandoned its right to vote on consolidation and the company's charter "specifically excluded" it from such voting rights (R. 506, 507).

> "2. *Collateral modification of bankruptcy decrees and plans of reorganization by State courts.*
>
> Whether the decrees of the United States Districts Court entered in the bankruptcy proceeding of Hoe (R. 430-466) and the plan of readjustment and certificate of incorporation approved thereby are subject to collateral attack or modification by judicial or administrative authorities of the State of New York by permitting the filing of a certificate of consolidation which amends the certificate of incorporation in violation of the terms of said decrees?"

No decree of the Federal court has been "subject to collateral attack or modification by judicial or administrative authorities of the State of New York". There has been no attempt by any one to challenge the validity of any Federal court decrees and when this identical question was presented by this petitioner to the Federal courts, it was overruled (*In re Hoe & Co., Inc.*, 93 F. Supp. 762, appeal dismissed, 186 F. 2d 716).

> "3. *Res adjudicata of bankruptcy decrees.*
>
> Whether the District Court bankruptcy decrees and the Hoe Plan of Readjustment approved thereby are judgments *in rem* which the Court of the State of New York must recognize under Federal Law under the doctrine of *Stoll* v. *Gottlieb*, 305 U. S. 165?"

No one has challenged *Stoll* v. *Gottlieb*. It has no more application to this case than the Rule in *Shelley's* case.

These alleged Federal questions simply do not exist. As Pooh-Bah remarked on another occasion, this "is merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative".

These questions were not presented to the trial court, the Appellate Division or the Court of Appeals. It is true that the complaint alleges that the stockholders' "meeting" was in violation of "the Constitution of the United States of America, and amendments Fifth and Fourteenth thereof" (R. 15), but except for this statement, no argument was advanced in briefs or oral argument, before the trial court or the two appellate courts.

Petitioner asserts that the order denying his motion for a new trial raises the question. This is not the fact; and the attempt to comply with the rules of this court at pages 8-10 of the petition is wholly inadequate.

No certificate has been obtained from the highest state court to the effect that a Federal question was raised and decided. The decision passed on non-Federal grounds.

Under the decisions of the courts of New York, under these circumstances, a litigant is held to have waived and abandoned points not urged on appeal (CARDOZO, *J.* in *People* v. *Journal,* 213 N. Y. 1, 6; *Galloway* v. *Erie,* 116 App. Div. 777, aff'd on opinion below, 192 N. Y. 545).

In *Nicholson* v. *Greely Square Hotel,* 227 N. Y. 345, the court said (p. 349):

> "Even now there is no mention of the defense either in the brief or in the oral argument of counsel for the defendant. We hold it abandoned."

In *Galloway* v. *Erie, supra,* it is said (p. 780):

> "But the learned counsel for the defendant has waived this error by not mentioning it in his oral argument nor in his brief. We are therefore not called upon to consider whether it be substantial. In the same way he has waived the exceptions to the refusals to charge his requests in respect of the violation of section 663 of the Penal Code, and the charge of the plaintiff's request on that head. They

> may be serious, but it is not for us to seek out and enter into errors which the learned counsel for the defendant does not claim to be aggrieved by."

This court has held repeatedly that Federal questions if relied upon here, must not only be properly raised in the first instance at trial term but preserved by argument and brief in the appellate courts; otherwise they will be deemed abandoned.

In *Herndon* v. *Georgia,* 295 U. S. 441, 79 L. Ed. 1530 the indictment was attacked upon the ground that the statute was "in violation of the Constitution of the United States". In holding that the petitioner had not properly raised the Federal question for review or preserved it in the appellate courts, the court said (p. 442):

> "We find it unnecessary to review the points made, since this court is without jurisdiction for the reason that no federal question was seasonably raised in the court below or passed upon by that court.
>
> "It is true that there was a preliminary attack upon the indictment in the trial court on the ground, among others, that the statute was in violation 'of the Constitution of the United States', and that this contention was overruled. But, in addition to the insufficiency of the specification, the adverse action of the trial court was not preserved by exception *pendente lite* or assigned as error in due time in the bill of exceptions, as the settled rules of the state practice require. In that situation, the state supreme court declined to review any of the rulings of the trial court in respect of that and other preliminary issues; and this determnation of the state court is conclusive here."

In *Wilson* v. *Cook,* 327 U. S. 474, 90 L. Ed. 793, it is said (p. 481):

"As the record does not show that the pliantiffs presented for decision to the state Supreme Court any federal question, they have no appeal to this Court unless the opinion of the state Supreme Court shows that that court ruled on the validity of a state statute under the laws and Constitution of the United States."

The opinion continues (p. 483):

"But we are not free to consider these grounds of attack for the reason that they were not presented to the Supreme Court of Arkansas or considered or decided by it. While the constitutional question now sought to be presented is in some measure related to that decided by the state court, and, like it, arises under the implied constitutional immunity of the Federal Government from state taxation, it is not merely 'an enlargement' of an argument made before the state court, but is so distinct from the question decided by the state court that our decision of the issue raised there would not necessarily decide that now sought to be raised. Compare *Dewey* v. *Des Moines,* 173 U. S. 193, 197, 198, 43 L. ed. 665, 666, 19 Ct. Ct. 379. We are therefore not free to consider it.

"In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented.' *New York ex rel. Cohn* v. *Graves,* 300 US 308, 317, 81 L ed 666, 673, 57 S Ct 466, 108 ALR 721, and cases cited."

In *Hulbert* v. *Chicago,* 202 U. S. 275, 50 L. Ed. 1026, the court said (p. 280):

"The mere claim in the objections to the confirming of the assessment, never afterwards brought to the attention of the trial court or of the supreme

court, was not sufficient. There is no evidence in the record to show that the decision of either of the courts was invoked by plaintiff in error upon a right claimed under the Constitution of the United States."

Petitioner states "that the trial and the Appellate courts below based their decisions on the alleged grounds of state law in complete evasion of the foregoing Federal questions for the purpose of defeating review by this court as petitioner contends" (p. 7); that the ruling by the state courts to the effect that the common stockholder had no right to vote on this consolidation is "an arbitrary device to prevent review by this court" (p. 23); and that the mere citation of *Anderson* v. *International Minerals & Chemical Co.*, 295 N. Y. 343 "may properly be regarded as an evasion of a decision on a Federal question presented to it" (p. 26).

We challenge this utterly unfair and irresponsible attack upon the integrity of the courts of the State of New York. There is no evidence to justify it.

V

The consolidation having been fully consummated, securities of the value of upward of ten million dollars issued thereunder, and the rights of the purchasers for value thereof having become vested, the questions now urged are moot and for that reason the petition should be denied.

On November 29, 1950, after the Appellate Division had unanimously denied petitioner's motion for a stay pending appeal from a judgment dismissing the complaint on the merits, said consolidation was duly consummated, the certificate of consolidation filed in the office of the Department of State of the State of New York; the new securities have been issued; and stockholders owing the old securities have exchanged the same, in large part, for the new.

Dividends have been declared and paid on the new securities on January 15th, April 15th, July 15th, and October 15th, 1951.

The new Class A stock has been fully listed on the New York Curb Exchange and bought, sold and traded in on said exchange. The new common stock has been bought, sold and traded in on the over-the-counter market. Rights of the holders of these securties have become vested. There are approximately 2500 stockholders of this company and they are located in virtually every state of the United States and some reside in foreign countries. There is no subject matter on which any injunction which this court might issue, could operate.

The *status quo* cannot be restored and it would be impossible for respondent to comply with any order requiring it to do so. There is no practical way in which respondent could recover shares of stock which have already been issued pursuant to the consolidation or dividends paid on the new stock, even if directed so to do by this court. The suit was brought to obtain an injunction. The Appellate Division so found, saying: "The suit was instituted primarily for an injunction to restrain a corporate consolidation". Attorneys for petitioner, in seeking interim stays have repeatedly sworn that the sole purpose of the suit was to obtain an injunction; that "denial of the stay will destroy the purpose of the *entire* litigation"; that such denial would "render the litigation nugatory"; and would "nullify any judgment" which petitioner might obtain.

It is clear, therefore, that the points urged are moot and that this court is being called upon to perform a futile and meaningless act, *i.e.*, to restrain Hoe from doing that which has already been accomplished. In *1130 President Street Corp.* v. *Bolton Realty Corp.*, 300 N. Y. 63, it is said (p. 69):

> "Injunctive relief should be addressed only to acts which are 'threatened or imminent' (see *People* v. *Canal Board*, 55 N. Y. 390, 395)."

In the case at bar no act is " threatened or imminent".

It is axiomatic that courts do not pass judgment upon causes which are academic or moot at the inception of the suit or which have thereafter become so.

In *Brownlow* v. *Schwartz*, 261 U. S. 216, 67 L. Ed. 620, petitioner filed a petition praying for a writ of mandamus against respondent requiring him to issue a permit to erect a building for a business purpose on a lot situated on a residence street in Washington. The trial court dismissed the petition. On appeal, the judgment was on February 7, 1921 reversed and the cause remanded with directions to issue the writ as prayed. After the decision of the Court of Appeals and before the allowance of the writ of error the permit was issued and the building erected.

This court dismissed the writ of error, saying (p. 217):

> "It thus appears that there is now no actual controversy between the parties,—no issue on the merits which this court can properly decide. The case has become moot for two reasons: (1) Because the permit, the issuance of which constituted the sole relief sought by petitioner, has been issued, and the building to which it related has been completed; and (2) because, the first reason aside, petitioner no longer has any interest in the building, and therefore has no basis for maintaining the action.
>
> "This court will not proceed to a determination when its judgment would be wholly ineffectual for want of a subject-matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this court uniformly has declined to entertain" (Citing many authorities).

The opinion continues (p. 218):

> "We are interested only in the indisputable fact that his action, however induced, has left nothing to litigate. *American Book Co.* v. *Kansas,* 193 U. S. 49, 48 L. ed. 613, 24 Sup. Ct. Rep. 397. The case being moot, further proceedings upon the merits can neither be had here nor in the court of first instance."

It is now belatedly contended that the prayer of the complaint includes a demand for a judgment declaring the stockholders' "meeting" unconstitutional (R. 15). It appears from the foregoing, we submit, that the essential character of the suit is one for an injunction, the petitioner has so admitted and the Appellate Division has so held. But even if the suit be viewed as one for a declaratory judgment, the petition should be denied.

In *Somberg* v. *Somberg,* 263 N. Y. 1, it is said (pp. 4-5):

> "A declaratory judgment may be resorted to only when circumstances render it 'useful and necessary'; where it will 'serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations.' (*James* v. *Alderton Dock Yards,* 256 N. Y. 298, 305.)"

The rule in the Federal courts is precisely the same. The statute (28 U. S. C. A. 2201) limits its application to cases of "actual controversy". In *Aetna Life Insurance Co.* v. *Haworth,* 300 U. S. 227, 240-241, Mr. Chief Justice HUGHES, writing for the court, said:

> "A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot."

Apparently petitioner concedes that "it is impossible to unscramble the omelet," (p. 36); but suggests that this court award damages. The complaint includes no prayer

for such relief (R. 15). It is, as the Appellate Division has held, a suit "for an injunction to restrain a corporate consolidation" and nothing more.

VI

This consolidation is authorized by the Stock Corporation law.

Section 86 of the Stock Corporation Law provides:

> "Any two or more domestic business corporations may be consolidated into a single corporation, which may be either a new corporation or any one of the constituent corporations * * *" by the filing of a proper certificate.

It is significant that the Legislature, with knowledge that many consolidations have taken place between a parent and its subsidiary, did not qualify or limit the words "any two or more domestic business corporations". If it had intended to outlaw consolidation with a subsidiary all that would have been required was to add the phrase, "except by a corporation with its subsidiary". In fact, in the lower courts, petitioner conceded that consolidation with a wholly owned subsidiary "is entirely legal".

Our section 86 is practically identical with section 59 of the Delaware statute providing for mergers. The Supreme Court of Delaware construed that statute in *Federal United Corp.* v. *Havender,* 11 A. 2d 331 decided in 1940. It is the leading case in the United States on the subject and is directly in point. In a comprehensive opinion, citing authorities from many states, the Supreme Court held valid under section 59 a merger by one corporation with its wholly owned, inactive subsidiary, the merger being designed for the sole purpose of eliminating accumulated dividends on preferred stock, an objective which could not be accomplished by charter amendment. There the court said:

"The shareholder has notice that the corporation whose shares he has acquired may be merged with another corporation if the required majority of the shareholders agree. He is informed that the merger agreement may prescribe the terms and conditions of the merger, the mode of carrying it into effect, and the manner of converting the shares of the constituent corporations into shares of the resulting corporation. * * *

"Looking to the law which is a part of the corporate charter, and, therefore, a part of the shareholders' contract, he has not been deceived nor lulled into the belief that the right to such dividends is firm and stable. On the contrary, his contract has informed him that the right is defeasible; and with that knowledge the stock was acquired."

In *Beechwood Securities* v. *Associated Oil,* 9 Cir., 104 F. 2d 537, it is said (p. 540):

"No fraud warranting the setting aside of a consolidation is committed on the shareholder when he receives the exact treatment the statute advised him was his due when he invested in the shares."

See, also:

Hottenstein v. *York Ice Machinery Co.,* 3 Cir., 136 F. 2d 944;
Hubbard v. *Jones & McLaughlin,* 42 F. Supp. 432;
Porges v. *Vadsco Sales Corp.,* 32 A. 2d 148.

It is a cardinal rule of statutory construction that the courts will give to a statute, where the language is plain and understandable, the exact meaning conveyed by the language, adding nothing and subtracting nothing. (*Cooper-Snell* v. *State,* 230 N. Y. 249; *Tompkins* v. *Hunter,* 149 N. Y. 117, 122.)

Plaintiff Failed to Produce a Scintilla of Evidence of Fraud

Petitioner asserts as one of his principal grounds of fraud that the plan is inequitable and unfair to the common stock. The same contention was asserted in all of the foregoing cases and overruled. It was conclusively answered in *Zobel* v. *American Locomotive Co.*, 182 Misc. 323, (p. 328):

> "True, plaintiffs say that the plan is so unfair to the preferred stockholders, in favor of the common stockholders, that it amounts to fraud, but, as has been indicated above, there is here nothing more than an emphatic way of saying that as a matter of business judgment plaintiffs would rather keep what they now have. No actual bad faith is shown, and neither is there such unfairness, if any, as would justify an inference of fraud."

Plaintiff also contends that the organization of the subsidiary was a "blind" or "ruse". The trial judge held (R. 653): "On the submitted evidence, this court is unwilling to hold that the consolidation is a ruse by means of which the provisions of section 35 are being avoided."

Plaintiff's own evidence completely demolishes this contention. He called to the stand Hoe's attorney, who had been a director since 1937 (R. 69). He testified, *on direct*, that the organization of the subsidiary had been under consideration for over a year prior to July, 1950 (R. 80); and that one of the purposes of organizing the subsidiary was "more effectively to handle the export business" (R. 80). He continued (R. 81):

> "I have long discussed with Mr. Auer, the president, and other of our operating officials the organization of a subsidiary to handle that business in order that the profit of that supplementary equipment might inure to the benefit of R. Hoe & Co., Inc.

and not to the benefit of the agent. I thought that that work could be more effectively handled in that fashion. Another reason was that we are agents, or rather, Hoe is the agent of an English firm, R. W. Crabtree & Sons, Ltd., manufacturers of printing presses and other graphic arts equipment in London and Leeds. We sell goods of their manufacture and I thought it would minimize the friction between ourselves and our competitors and ourselves and labor unions in selling English-made goods in view of the fact that the labor rates in England are far lower than ours. It seemed to me better to localize the operation in another company. The subject was discussed also, of incentive arrangements which could better be made with a subsidiary than with R. Hoe & Co., Inc., in so far as the managers of the subsidiary were concerned."

He also testified that another purpose was to afford a legal means of effecting a recapitalization through a consolidation (R. 80); and that if, as the result of the consolidation the subsidiary ceased to exist, he would advise that another be organized for the purpose of carrying out the purposes of its organization (R. 77).

It is common knowledge that many manufacturing companies hold their securities, operate their real estate, or conduct their foreign business, through the medium of subsidiaries.

Plaintiff asserts that this evidence is incredible, and that, in truth, there was no legitimate purpose for the organization of the subsidiary.

This testimony was unimpeached and undenied and it is elementary law that plaintiff is bound by the testimony of this witness whom he called and thereby certified to the court as worthy of credence. (*Hanrahan* v. *New York Edison Co.*, 238 N. Y. 194, 197.)

For the same reason, plaintiff is bound by the testimony of his witnesses, Kadel (R. 219) and Littleton (R.

256). In addition defendants called to the witness stand the following: Auer (R. 337, 338), Barr (R. 359-363), Brown (R. 305, 310, 320) and Tillinghast (R. 375, 376); and plaintiff stipulated that Canady, Munzert and Foster, who could not be produced, would have testified to the same effect, if called (R. 387).

All of these witnesses testified, in substance and effect, that they resorted to no trick, device or subterfuge; that they entered into no conspiracy to deprive the common stock of a vote or in any wise adversely to affect it; and that they voted for the consolidation in the sincere conviction that it was in the best interests of the corporation and all of its stockholders, including the common stock.

This unimpeached and uncontradicted evidence "cannot be disregarded by court or jury" and "must be believed for judicial purposes" (*People* v. *Tuczkewitz,* 149 N. Y. 240, 251).

The brief of petitioner proceeds upon a fundamentally false premsie, *i. e.*, that the consolidation was a device for "depriving the common stock of the right to vote". Nothing could be further from the truth. This stock effectually renounced, waived and abandoned its right to vote on a consolidation under section 86, or to amend, under section 36 (now 35), and on the basis of such renunciation and consent the Federal court, in 1935, decreed that its voting rights be so limited. Ignoring this essential fact, petitioner proceeds to argue that respondents have "deprived the common stock of its right to vote"—a postulate based upon a fiction.

Twice plaintiff and his attorney have sworn unequivocably that, except to elect two directors and to vote on dissolution, "the common stockholders have no other voting rights of any kind whatever" (R. 647). The certificate of incorporation, as amended, plainly so stated and the trial

judge has so ruled (R. 652, 653). Petitioner now argues that he has been deprived of a right which he has sworn he does not possess.

The Charge That the Consolidation Is Inequitable and Unfair to the Common Stock Is Irrelevant and Presents No Justiciable Question

The problem before this court is not whether experts employed by petitioner may testify that the plan of recapitalization is fair or unfair or whether the court regards it as the best possible plan. This court is not concerned with that problem and will not substitute its own judgment for that of the directors and officers of the company.

The trial court so ruled (R. 653):

> "It should always be borne in mind in these cases that the court, in the absence of a very plain showing of either fraud or improvidence, will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature. (*Zobel* v. *American Locomotive Company*, 182 Misc. 323; *Turner* v. *The American Metal Company*, 268 App. Div. 239.)"

See, also:

Liebschutz v. *Schaffer Stores Co.*, 276 App. Div. 1, 6;
Zobel v. *American Locomotive Co.*, 182 Misc. 323, 325;
Gamble v. *Queens County Water Co.*, 123 N. Y. 91, 99;
Turner v. *American Metal Co.*, 268 App. Div. 239, 259 (appeal dismissed 295 N. Y. 822).

Petitioner asserts that the consolidation is a disguise for a recapitalization. This same contention has been ad-

vanced and overruled by every court dealing with the problem. In *Zobel* v. *American Locomotive,* 182 Misc. 323, the court states (p. 327):

> "They also urge that a consolidation with wholly owned subsidiaries is not in reality a consolidation but a mere misnomer for a recapitalization. There again, the answer is that the Legislature has authorized consolidation. Identically the same contentions have been repeatedly rejected in other States under identical statutes."

In other words, petitioner's position comes down to this simple issue: This company could recapitalize in two ways, either by consolidation under section 86, where, concededly, the common stock has no right to vote, or by amendment of the charter under section 35 where, he claims, the stock has the right to vote. The criticism is that management chose the alternative, which petitioner does not prefer: *ergo,* fraud. Respondents claim that it not only was the right, but the unmistakable duty, of the directors to select that course which recognized and gave effect to the equities of the two classes of stock.

In *Havender* (11 A. 2d 331) and *Hottenstein* (136 F. 2d 944) it has been held that even though a charter amendment to cut off dividends may be unauthorized or illegal, a merger or consolidation bringing about the same result is lawful. These cases recognize the essential difference between a recapitalization by amending the charter and by consolidation. This distinction was also plainly recognized in *Anderson* v. *International Minerals & Chemical Corp.,* 295 N. Y. 343. There the court said (p. 349):

> "In this case we are dealing with the provisions of the New York Stock Corporation Law having to do with merger and consolidation (art. 8). This provision differs in language, purpose and subject matter from Article 4 relating to the reclassification

of shares under which the cases arose upon which plaintiff relies."

Every consolidation brings about a recapitalization. Section 86 provides that the certificate of consolidation shall set forth the name of the new company, its purposes, a complete restatement of the provisions concerning its authorized capital stock, the location of the company, its duration, the number of directors, etc., etc.—in fact, every statement which must be set forth in a certificate of incorporation filed under section 5, except those which are by their nature inapplicable, such as the names and addresses of the incorporators. Obviously, the intention is to create a new certificate of incorporation for the consolidated corporation, whether it be a new entity or one of the constituent corporations.

To say that the proposed consolidation must be held invalid because it resulted in a recapitalization of Hoe, is to ignore the essential character of a consolidation as well as the plain intent of the statute.

VII

The doctrine of comparative equities requires denial of the petition.

Katz stands alone. When he bought his 500 shares of common stock for about $4,000, was he investing or was he buying a lawsuit? The vast body of stockholders whom he pretends to represent will have nothing to do with this suit. They are satisfied with the recapitalization.

The unanimous Appellate Division said that "a balancing of equities weighs in favor of such third parties and the benefit to the corporation as opposed to plaintiff, one stockholder, who has instituted this action joined only by

defendant Martin, another common stockholder and also a director". Martin has not joined in this petition.

Katz' bad faith and efforts at harassment and obstruction are evidenced by his tricky attempt to defeat and evade the judgment of the very court whose equity powers he invoked, by resort to the Federal Court, during the trial of this case.

In *Block* v. *Propp*, 174 Misc. 122, the Court said of a stockholder's suit (p. 124):

> "* * * inasmuch as the stock of the corporation was publicly traded in on the securities' markets, there was a public interest involved."

The court said in *Treadwell* v. *United Verde Copper Co.*, 134 App. Div. 394, 399:

> "The action is in equity and its determination must be governed by equitable principles, having regard not to the interest of the plaintiff alone, but to all of the parties interested."

Equity will not intervene where the interests of innocent parties can best be protected by remitting plaintiff to his legal or statutory remedies; and this principle applies even in situations where a minority stockholder had no remedy of appraisal.

In *Drake* v. *New York Suburban Water Co.*, 36 App. Div. 275, a reorganization was effected by foreclosure proceedings. There was no remedy of appraisal applicable at the time. Although the transaction was found to be invalid, the Appellate Division reversed a judgment setting it aside, CULLEN, *J.*, writing:

> "The plaintiff is the only stockholder who seeks to avoid the transactions of which he complains. He is appealing to a court of equity, whose first rule is that he who seeks equity must do equity. Here the

> holders of a million and a half of bonds are interested in having the foreclosure sale stand. * * * If this foreclosure suit is set aside, and the judgment opened, the parties will be remitted to a litigation that may last for years before it is finally composed. The expense of such a litigation would be many times the value of the plaintiff's interest. By enforcing such a litigation, the plaintiff can subject the parties to this expense, or compel them to buy him out at an exorbitant price. We do not think he should be allowed to take such a course. * * * The plaintiff or his predecessor in title evidently regarded it as more profitable not to defend himself against the alleged wrongs upon him during the time of their commission, but to await their infliction, and thereafter bring a suit. When he stands simply on his legal rights, and proceeds in a court of law, he may be entitled to the benefit of that course, however much wrong it may inflict on innocent parties; but when he finds himself compelled to appeal to equity for relief a different rule should prevail. He should be entitled merely to full indemnity."

In *Treadwell* v. *United Verde*, 134 App. Div. 394, the court dismissed a minority stockholder's complaint upon the authority of the *Drake* case which it quoted with approval (p. 401). There the stockholder obtained at Special Term an *ex parte* stay which was vacated when the motion came on for hearing, but, on appeal the order was reversed and the stay granted. In the interval, however, the reorganization had been consummated. On the trial, the court set it aside as fraudulent and illegal. Upon appeal, the judgment was reversed.

Mr. Justice McLaughlin, writing for a unanimous court, said (p. 400):

> "It then appeared that all of the stockholders, except the plaintiff, who held about a one four-thousandth part of the stock, were entirely satisfied and had exchanged their stock in accordance with the

plan of reorganization. The dissolution having been accomplished, the sale having been made, and about three thousand nine hundred and ninety-nine four-thousandths of the stockholders satisfied with what had been done, it would be unjust and inequitable to them, at the behest of one holding only about one four-thousandth, to wipe out all that had been accomplished and destroy a going and profitable concern by ordering a resale of the property. *The plaintiff's position in now insisting upon such sale, taking into consideration its necessary result and the expense attending the same, does not commend itself to and cannot receive the sanction of a court of equity.''* (Emphasis supplied.)

It would be a shocking denial of justice, we submit, to permit this plaintiff, owning stock for which he paid not more than $4,000, to frustrate and defeat this recapitalization with which the vast majority of stockholders are entirely satisfied. It would be impossible for this court effectively to compel the repayment of dividends by stockholders in distant States, to require them to reconvert their securities, and Hoe to do all the manifold, burdensome and, in fact, impossible acts necessary to reinstate the *status quo*. Katz will not be harmed. The right of appraisal was at all times available to him. He can always exchange his stock and obtain the new stock and accrued dividends; or he can sue at law if he be so advised.

VIII

Petitioner has an adequate remedy at law; appraisal constitutes the exclusive remedy of a stockholder not wishing to participate in the plan.

In the application for a temporary injunction (*Katz* v. *Hoe*, 99 N. Y. Supp. 899, aff'd 277 App. Div. 966), the court correctly ruled that the right of appraisal "eliminates any contention of irreparable injury and lack of an adequate remedy at law". The trial judge also so held (R. 654).

It is, of course, axiomatic that before plaintiff can succeed, he must prove, in this suit in equity, that he has no adequate remedy at law. He expressly recognizes this necessity in his pleading (R. 15).

Plaintiff, in substance and effect, says to this court:

> We know that on an appraisal we will receive in cash every penny to which we are entitled—the full and fair equivalent of each and every right surrendered, including future prospects of increase on our investment. Nevertheless, we will not accept this fair treatment because we want to control the company and exercise the veto on any plan of recapitalization which management proposes. It is no longer a question with us of full, fair and complete compensation for every right we possess, we claim the veto power.

What plaintiff wants is to "compel the majority to buy him out on his own terms". (*Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343.) The law of the State of New York, as declared by the Court of Appeals, is that a dissenter has no such right and that when he receives full, fair and complete compensation for every right he possesses, he cannot go further and obstruct, hinder and delay the company from taking action which the great majority of stockholders approve.

In *Beloff* v. *Consolidated Edison Co.*, 300 N. Y. 11, it is said (p. 19):

> "It is fully as well settled that if the merger (or consolidation) is duly consummated in accordance with the statutes, the remedy of appraisal and payment is the only one available to dissenting shareholders, and that such dissenters on such an appraisal are entitled to receive fair and full compensation for all their rights (*Matter of Timmis*, 200 N. Y. 177; *Logan* v. *New Amsterdam Gas Co.*, 224 N. Y. 664; *Anderson* v. *International Minerals & Chemical Corp.*, 295 N. Y. 343, 350; see *Matter of Fulton*, 257 N. Y. 487, 494). * * *
>
> "In short, the merged corporation's shareholder has only one real right; to have the value of his holding protected, and that protection is given him by his right to an appraisal (see *Voeller* v. *Neilston Warehouse Co.*, 311 U. S. 531, 535)."

See, also:

Liebschutz v. *Schaffer Stores Co.*, 276 App. Div. 1, 6;

Anderson v. *International Minerals & Chemical Corp.*, 295 N. Y. 343.

IX

The petition should be denied.

Respectfully submitted,

NEIL P. CULLOM,
Counsel for Respondents.

HUYLER HELD,
STANFORD SCHEWEL,
On the Brief.

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Petitioner,

against

R. HOE & CO., INC., *et al.*,

Respondents.

Affidavit of Charles E. Littleton

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

CHARLES E. LITTLETON, being duly sworn, deposes and says:

I am secretary of R. Hoe & Co., Inc., respondent herein. This affidavit is submitted in opposition to petitioner's application for a writ of certiorari.

The Parties

(1) This suit was brought in equity to obtain an injunction to restrain the consummation of a plan of consolidation under section 86, New York Stock Corporation Law,

which was approved by the stockholders of R. Hoe & Co., Inc., on September 12, 1950. Plaintiff, a lawyer, acquired 500 shares of common stock, representing an approximate investment of $4,000, out of an issue of 160,000 shares, or 3/1000ths of that issue on December 23, 1949, at just about the time this plan was being considered. At the time of the consolidation there were outstanding 95,997 shares of Class A stock, 194,767 shares of B stock and 160,000 shares of Common stock.

Katz is the sole stockholder now attempting to veto the consolidation.

Respondent, R. Hoe & Co., Inc., is a manufacturer of printing presses, located in New York, N. Y., and the individual defendants are its officers and directors.

The Plan Is Fully Consummated

(2) On Novemer 29, 1950, after the Appellate Division had unanimously denied petitioner's motion for a stay pending appeal from a judgment dismissing the complaint on the merits, said consolidation was duly consummated and the certificate of consolidation filed in the office of the Department of State of the State of New York; the new securities under said plan have been issued; and stockholders owning the old securities have exchanged the same, in large part, for the new, as follows:

Class A

Authorized	*Issued and outstanding*	*Ratio of outstanding stock to authorized stock*	*Value of issued and outstanding Class A stock at approximate market of $15 per share*
481,371.5 shrs.	472,271	98.109%	$ 6,139,523

Common Stock

uthorized	*Issued and outstanding*	*Deposited in and subject to appraisal proceedings*	*Ratio of outstanding stock to authorized stock after deducting shares in appraisal proceedings*	*Value of issued and outstanding common stock at the approximate market value of $8.62½ per share*	
46,761	462,242	66,547	96.258%		$ 3,986,889

Total indicated market value of new Class A and Common Stock distributed on surrender of old stock.....$ 10,126,412

Four dividends have been declared and paid on the new securities, *i.e.*, on January 15, 1951, April 15, 1951, July 15, 1951 and October 15, 1951.

The new Class A stock has been fully listed on the New York Curb Exchange and bought, sold and traded in on said exchange. The new common stock has been bought, sold and traded in on the over-the-counter market. Rights of the holders of these securities have become vested. There are approximately 2500 stockholders of this company and they are located in virtually every state of the United States and some in foreign countries.

All Questions Now Urged by Petitioner Are Moot

(3) It is clear that this suit brought for an injunction is now wholly academic. There is no act in respect of the consolidation which this court can restrain. The questions sought to be presented are moot.

Petitioner advances the pretense that the suit is for a declaratory judgment. On the contrary, an attorney, applying for a stay pending appeal, on behalf of petitioner

swore on November 1, 1950: " Under the circumstances, denial of the stay will *destory the purpose of the entire litigation* and effect irreparable injury and harm to the common stockholders". On November 15, 1950 he again swore: "The requirement of a bond would nullify the stay and *render the litigation nugatory*". He again stated on October 3, 1950: "The denial of the stay would *nullify any judgment* they (plaintiffs) might obtain".

It is thus clear that petitioner has deemed the suit, and so represented to the court, as one solely for an injunction.

Katz Is the Sole Stockholder Now Challenging the Consolidation

(4) Katz, representing 3/1000ths of the common stock, last in the order of senority, is the sole stockholder now attacking this consolidation. He asserts that "the petitioner and the holders of 93,000 common shares of Hoe have been deprived of property without compensation worth over $1,500,000" (p. 35). This statement is utterly false. As we have shown, 96.25% of all the common stock which can be exchanged under the plan has been so exchanged and is now enjoying the dividends and other benefits which it affords. There is not one stockholder who joins him in this effort to prolong this litigation and no one will have anything to do with this strike suit. He represents no one but himself in trying to veto a plan which has met with the overwhelming approval of all classes of stock. Another common stockholder, one Martin, joined him originally, but has abandoned the suit.

Katz has suffered no damage. The average price per share of the common stock from June 1, 1948, to December 4, 1950, according to the National Quotation Bureau, was $6.87; the price on the day before the consolidation, September 11, 1950, was approximately $7 per share and the

current price is approximately $8.62 per share, or with accrued dividends of 50¢ per share, $9.12.

If he exchanges his stock he will obtain the new stock and accrued dividends. The right of appraisal was at all times available to him; or he can sue at law if he be so advised.

Fifteen different state court judges and four federal judges have, without a single exception, ruled against plaintiff. It is a groundless suit, pure and simple; and if this court is to pronounce judgment on the abstract questions which petitioner seems to want decided, it is submitted that it should be done in a real controversy, not a moot, academic abstraction, where there is no act which can be restrained and where plaintiff's cause has been found, by all the courts who have passed on it, utterly wanting in equity.

The Alleged "Federal Questions" Were Not Saved for Review

(5) Petitioner's complaint in the court below contained a prayer for relief that the Court hold that "said *proposed meeting* (of stockholders) if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of the laws of the State of New York, the Constitution of the State of New York, the Constitution of the United States of America and amendments 5 and 14 thereof, the Securities Exchange Act of 1934, and appropriate and relevant regulations issued thereunder" (R. 15). (Italics supplied.)

Except for the above statement the alleged constitutional questions now sought to be reviewed, were not raised on the trial and were not argued orally or in petitioner's briefs before the trial court, the Appellate Division or the New York Court of Appeals.

It is respectfully submitted that the petition should be denied.

CHARLES E. LITTLETON

Sworn to before me this 17th day of October, 1951.

HELEN SCHAEFFLER
Notary Public, State of New York
Qualified in Kings County
No. 24-8787900
Cert. filed with Kings Co. Reg.
N. Y. and Bronx Co. Clk's. and Reg's.
Commission Expires March 30, 1952.
(Seal)

NOV 5
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & CO., INC., similarly situated,

Petitioner,

v.

R. HOE & CO., INC. *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER

GUSTAVE B. GARFIELD,
Attorney for the Petitioner.

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The Federal Questions presented (as amended):

Whether the consolidation of Hoe with its subsidiary violates its Plan of Readjustment and Amended Certificate of Incorporation both approved by the Decree of the United States District Court in the 77 B Proceeding of 1935, by depriving the common stockholders of their vested cumulative and other voting rights without their majority consent, and without the approval of the United States District Court, both of which are immutably required by said Plan and by the Decree of the U. S. District Court approving it? 19

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IN THE

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OCTOBER TERM—1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & CO., INC., similarly situated,

Petitioner,

v.

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Respondents.

REPLY BRIEF OF PETITIONER

POINT I

"The right to be a freeman of a corporation is a valuable temporal right. It is the right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for the violation of which it provides a remedy. It is founded on the same basis as the right of voting in public elections: it is a sacred right" (Story, J., in *Dartmouth College* v. *Woodward*, 4 Wheat. 518, P. 701).

Recognizing that the Hoe Plan of Readjustment, approved by the decree of the United States District Court for the Southern District of New York in 1935, is the fount

of the voting rights and contractual obligations *inter sese* of its respective classes of stockholders, Respondents call attention to "The extraordinary limitations and restrictions imposed upon the common stock by the Federal Court Receivership" (Headnote p. 7, Res. Br.). Respondents assert: "It thus appears that not only were all voting rights (*with immaterial exceptions*) vested in Class A stock but the common stock was 'specifically excluded' from voting on a consolidation pursuant to section 86, as well as from the right to vote 'for establishing priorities or creating preferences' pursuant to section 36, now 35" (Resp. Br., 8; italics added).

It is with these class voting rights of the common stockholders, lightly brushed aside by Respondents as IMMATERIAL EXCEPTIONS, which were vested in the common stockholders by the Plan of Readjustment, in Bankruptcy, that we are here concerned: *i.e.*, the right of cumulative voting in the election of directors; the right to vote on any amendment to the corporate charter affecting the election of directors; and the right to elect six out of eleven directors, once the arrears on the "A" stock were eliminated; in short, the right to take control of the debtor from the "A" stock, by means of the corporate elective process. For this, the common stockholders had been waiting fifteen years, at the time that the plan of consolidation was effectuated in 1950.

Fully a century before *Dartmouth College* v. *Woodward*, 4 Wheat. 518 (U. S. 1819), was decided by this Court, Lord Holt had settled the doctrine that voting rights in corporate elections were vested property rights. Justice Story, writing in *Dartmouth College* v. *Woodward*, says at page 701:

> "The right to be a freeman of a corporation is a valuable temporal right. It is the right of voting and acting in the corporate concerns, which the law recognizes and enforces, and for the violation of which it

provides a remedy. It is founded on the same basis as the right of voting in public elections; it is a sacred right; and whatever might have been the prevalence of former doubts, since the time of Lord Holt, such right has always been deemed a valuable franchise and privilege. Lord Holt says * * * Where the privilege of election is used by particular persons, it is a particular right vested in each particular man."

The cumulative voting right of the Hoe Common Stock in the election of directors; its origin and nature as a vested property right.

Mandatory Cumulative Voting first appeared in the Illinois Constitution in 1870. Since then, seventeen states of the Union have made similar provision in their constitutions. In *Looker* v. *Maynard,* 179 U. S. 46 (1900), it was settled by this Court that the State of Michigan had the right, under its reserved power, to so amend its laws as to make cumulative voting mandatory upon corporations organized before enactment of the amendatory statute.

Cumulative voting has also since 1870 become optional in seventeen states of the union, including New York. It is in this category that the rights of the stockholders of R. Hoe & Co. Inc., have been placed by the Plan of Readjustment in Bankruptcy, promulgated in 1935, by the Debtor Hoe, and voluntarily accepted by a majority of the holders of both classes of its stock, the "A" and the common. The source and nature of these cumulative voting rights are set forth in the Appendix to the Petition for a Writ of Certiorari (Pet. pp. 37-42), and they have not been disputed by the Respondents.

We are concerned, therefore, with the following contractual obligations voluntarily assumed by the Debtor Hoe in the Plan of Readjustment dated January 16, 1935 and fully accepted by the "A" stockholders and the common

stockholders alike: "All voting for directors will be cumulative * * * and provided further that *except with the consent of the majority of the common stock,* no amendment of the Certificate of Incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time." (Italics added.)

By the specific terms of Section 77B, sub. p. of the Bankruptcy Act as amended (48 Stat. 912), it is provided that this Plan of Readjustment "shall apply as fully to debtors (and their) stockholders * * * whose interests * * * have been acquired prior to that date (June 7, 1934) as to debtors (and their) stockholders * * * whose interests * * * are acquired after that date."

Petitioner therefore, took the restrictions and limitations on voting rights, as well as his cumulative and other voting rights, from the Plan of Readjustment in Bankruptcy, the moment he acquired his shares in December 1949. These voting rights and limitations are necessary concomitants of each other.

POINT II

"One gathers that the cumulative voting privilege when once accorded, cannot be taken away except by authority equal in grade to that by which the privilege was conferred" (Bowes & de Bow, Minn. Law Review, 1937, Vol. XXI No. 4, p. 351).

(a) **When Mandatory;** It is logical to assume that the right to grant cumulative voting under a constitutional reservation of power, is coextensive with the right to revoke such provision, whether founded on legislative enactment or constitutional provision; and that is the clear inference to be drawn from this Court's decision in *Looker* v. *Maynard, supra.* That proposition has only a peripheral interest in this case.

(b) **When Optional** by state statute, it has been the settled law, in New York and other jurisdictions alike (prior to the decision of the present case) that cumulative voting rights cannot be abrogated, except by authority equal in grade to that, by which the privilege was conferred.

Thus in New Jersey Chancery Court, in the case of *Loewenthal* v. *Rubber Reclaiming Co.,* 52 New Jersey Eq. 440 (1894) it was held that an attempt of the majority of stockholders to abrogate cumulative voting was a deprivation of a vested right and therefore illegal; while in New York's Appellate Division, First Department, *In the Matter of Jamaica Consumers Ice Co.,* 190 App. Div. 739, p. 741 (1920), unanimously affirmed, 229 N. Y. 516, held:

> "In Tomlin v. Farmers & Merchants Bank (52 Mo. App. 430, 436), the court said, referring to cumulative voting: 'The right is one guaranteed by law, constitutional and statutory; it is personal to the stockholder; it can be exercised or not by such stockholder as he may himself elect. (Pierce v. Commonwealth, 104 Pa. At. 155.) It, therefore, cannot be taken away from him by a resolution or by-law adopted by a majority of shareholders. (See, also, Attorney General v. Looker, 111 Mich. 498 *affirmed 178 U. S. 46;* Schmidt v. Mitchell, 101 Ky. 570.)" *Note: italic matter added.*

(c) When created pursuant to a Plan of Reorganization, approved by decree of the United States District Court, Cumulative and other Voting rights can be abrogated only in the manner provided in the Plan of Reorganization, and with the consent of the Bankruptcy Court which issued the decree approving the Plan. It is a judgment *in rem.* It may not be collaterally attacked or modified by a State Court, but effect must be given to it under the doctrine of *res judicata.*

Prudence Bonds Corp. v. *City Bank Farmers Trust Co.,* 186 Fed. 2nd 525 (2nd Cir.);

Diversey Building Corp. v. *Metropolitan Trust Co.*, 141 Fed. 2nd 65 (7th Cir.);
In re Pittsburgh Terminal Coal Corp., 183 Fed. 2nd 520 (3rd Cir.);
Stoll v. *Gottlieb*, 305 U. S. 165;
Gratiot County State Bank v. *Johnson*, 249 U. S. 248.

In *Gratiot County State Bank* v. *Johnson, supra,* this Court said:

> "The adjudication is, for the purpose of administering the debtor's property, conclusive upon the world * * *. So far as it declares the status of the debtor, even strangers to the decree may not attack it collaterally * * *. But an adjudication in bankruptcy like other judgments *in rem* is not *res adjudicata* as to the facts or as to the subsidiary questions of law on which it is based, *except as to parties to the proceeding or privies thereto.*"

In *Stoll* v. *Gottlieb, supra,* this Court had before it a Plan of Reorganization in 77 B Proceedings in Bankruptcy which had deprived a class of security holder of certain rights, which, despite such deprivation the courts of the State of Illinois had enforced as if unmodified by the Plan of Reorganization. Justice Reed, writing for this Court said:

> "This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of *res judicata* arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts. As the contention is that the ruling

below disregarded decrees of a court of the United States it raised a federal question reviewable under Section 237 (b) of the Judicial Code, 28 U.S.C.A., Section 344 (b).

• • • • • • • • • •

"The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form. This statute is broader than the authority granted by Article Four, Section One, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the federal court determines a right under a federal statute, that decision is final until reversed in an appellate court or modified or set aside in the court of its rendition. *As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the federal order, if it is concluded it was an effective judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of res judicata. In this particular case, a federal question was involved. This was the power of the federal courts to protect those who came before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grant of power.*" (Italics ours.)

What has the Respondents' answer been to the applicability of *Stoll* v. *Gottlieb* in this Court? It will be found at the bottom of page 26 of the Respondents' Brief:

> "No one has challenged *Stoll* v. *Gottlieb*. It has no more application to this case than the Rule in Shelley's case.
>
> These alleged Federal questions simply do not exist. As Pooh-Bah remarked on another occasion, this 'is merely corroborative detail, intended to give artistic verisimilitude to an otherwise bald and unconvincing narrative.' "

Thus do Respondents seek with ridicule, banter and evasion to dispose of valid legal arguments they cannot squarely meet. If *Stoll* v. *Gottlieb* has no application to this case, it can have no validity as a precedent in any State Court, and the supremacy of the Federal Courts in bankruptcy reorganizations is at an end.

The Gilbert and Sullivan note aside, Respondents' sole and entire answer to the doctrine established by this Court in *Stoll* v. *Gottlieb, supra,* is to repeat the dictum of Judge McGohey "This reorganized debtor was in 1935 sent 'out into the state as fully subject to state law as though this court had nothing to do with its creation. In re Ambassador Hotel Corp., 2 Cir., 124 Fed. 2nd 435' " (Resp. Br., p. 21).

On February 1, 1951, however, the Circuit Court of Appeals for the Second Circuit overruled its decision of *In re Ambassador Hotel Corp.* See *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.,* 186 Fed. 2d 525, where it will be found that the Second Circuit has adopted the rule of the Seventh Circuit, in *Diversey Building Corp.* v. *Metropolitan Trust Co.,* 141 Fed. 2nd 65. Chief Judge Learned Hand, writing for the unanimous Second Circuit said:

> "* * * there has undoubtedly been considerable difference of opinion about the court's power to accommodate the original 'plan' to changes after confirmation in the financial situation of the 'revived debtor.' On this question we declared ourselves four times between

1942 and 1946. In In re Ambassador Hotel Corporation (124 Fed., 2d, 435) the State of New York had passed the 'Streit Law' affecting voting trusts after a 'plan' had been confirmed which set up a voting trust, whose duration, though lawful at the time, it was alleged that that act had cut down. We held that the state courts alone had jurisdiction to decide whether it had done so, and we did not mention the circumstance that the order of confirmation contained no reservation of powers, so far as appears. * * *

* * * We therefore conclude that our earlier decisions, in so far as they depended upon the presence of an express reservation in either the 'plan' or the order of confirmation, were erroneous.

The question is one of discretion, though of a discretion which should be sparingly exercised, and which should not be exercised as in North American Car Corporation v. Peerless Machine Corporation (143 Fed., 2d, 938, C. A. 3), unless the circumstances peremptorily demand it. * * * *The Court may never under the guise of 'alteration' or 'modification' substitute an entirely new plan in place of the original''*; citing *Diversey Building Corp.* v. *Metropolitan Trust Co.*, 7th Cir., 141 Fed. 2nd 65. (Italics ours.)

The rights of cumulative voting were assuredly vested property rights the source of which was the Plan of Readjustment in Bankruptcy. In no event could they be altered without the consent of a majority of the common stockholders and of the Bankruptcy Court. Petitioner went to great pains on the trial to prove that no order of the Bankruptcy Court was ever obtained authorizing the impairment of the cumulative and other voting rights. We are thus presented with a situation where the Courts of the State of New York have permitted the "alteration" and "modification" of the Hoe Plan of Readjustment. Two Circuit Courts of Appeals are agreed that this may not be done. Thus in *Diversey Building Corp.* v. *Metro-*

politan Trust Co., supra, Judge Sparks, writing for the unanimous Seventh Circuit said:

> "We cannot accept appellant's interpretation of sub-section (f) of this Act. We are convinced that Congress did not intend that a debtor-corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the Court and was being executed under the Court's supervision. It is quite true that the quoted language from sub-section (f) states that changes and modifications may be proposed before or after a plan is confirmed; however, this sub-section must be construed with other pertinent sub-sections, such as (g) and (h), in determining the intention of Congress. *Here the plan as confirmed had been in operation for almost eight years, without complaint so far as this record shows, and it was originally proposed by the debtor itself. Under these circumstances we think the Court was without jurisdiction to entertain appellant's motion. We interpret sub-section (f) to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the Court."* (Italics ours.)

Respondents conceded on the trial that no order of the Bankruptcy Court was ever obtained modifying the 1935 Plan of readjustment which gave the common stockholders the right to vote cumulatively and prohibited amendment of the corporate charter affecting their voting rights without the consent of a majority of the common stockholders.

Vandiver Brown, an "A" director of Hoe, secretary and general attorney for Johns-Manville Corporation and chairman of the special committee of directors, appointed

to consider the 1950 Plan of Consolidation, testified (R. 307):

"Q. What, if any, corporate necessity was there for accomplishing this consolidation, in your opinion?

* * *

The Witness: To eliminate cumulative voting.

Q. *Did you know on June 14, 1950, when you voted for the plan of consolidation, Plaintiff's Exhibit 8 in evidence, that it was the purpose and intention of the A directors to deprive the common stockholders of the right to vote cumulatively for the election of two directors?* A. *I did not, because it was not a fact; I did not know that because it was not a fact.*

Q. *I call your attention to paragraph 10th—* A. To *deprive them of the right to vote cumulatively?*

Q. *That's right.* A. *I knew that; I'm sorry, I answered too quickly. That was part of the plan, an important feature of it.*

The Court: *That was part of the plan?*

The Witness: *Yes"* (R. 315).

"Q. *Do you, or to your knowledge, did any of the defendants obtain an order from the United States District Court in any way or any manner modifying the order of March 1, 1935?*

The Court: *It is conceded that they did not.*

Mr. Cullom: *Yes, sir, but it is an incompetent question.*

The Court: *Let us have the fact to save time. It is conceded that they did not?*

Mr. Cullom: *Yes, sir.*

The Court: *There is no further order of Judge Coxe in this proceeding other than the one in evidence here.*

Mr. Cullom: *Because none was required.*

The Court: *Never mind the 'because,' I will take the fact; there was not any?"* (R. 316).

POINT III

Consolidation of two corporations under State law may not be availed of as a device to evade the provisions of a plan of reorganization in bankruptcy.

In the case of *Northern Securities Company* v. *United States,* 193 U. S. 197, two railroad companies, operating competitive lines, formed a third corporation into which both were merged under the laws of the State of New Jersey. The government brought suit to declare the merger invalid as a violation of the Sherman Anti Trust Law. The defendant Northern Securities Company contended that it was validly organized under the Laws of the State of New Jersey and that since what was done by it was legal in the State of New Jersey, it was necessarily legal in the Federal Courts. This court rejected the pious pretentions of the defendants; Justice Harlan, in the course of the majority opinion said:

> "Every corporation created by a State is necessarily subject to the Supreme Law of the Land * * * no device in evasion of its provisions however skillfully such may have been contrived, * * * is beyond the reach of the Supreme Law of the Land. * * * No Corporate person can excuse a departure or violation of that rule under the plea that that which it has done or omitted to do is permitted or not forbidden by the State under whose authority it came into existence" (193 U. S. 197, pp. 345, 347).

A comparable situation arose in *Tomlinson* v. *Branch,* 15 Wall. 460, p. 464, where Justice Bradley writing for this Court said:

> "In declaring that one company shall be merged in the other, and that the rights, privileges and property of the one shall be vested in the other, the legislature

> cannot be understood to mean that the restrictions, limitations and burdens affecting that property and imposed for the benefit of the public or of individuals shall not go with it. The rights and privileges go with it, and those rights and privileges can with difficulty be separated from the restrictions and duties by which they are measured and qualified."

Writing in the University of Pennsylvania Law Review in 1927, E. Merrick Dodd Jr. said (75, U. of Pa. L. Rev. 585, 736):

> "Where the Consolidated corporations are not engaged in public service * * *. The power of eminent domain probably does not extend to such a case, and the consolidation act must, therefore, depend for its validity on the reserved power to amend. Although this power is in terms unlimited, it does not authorize amendments which are inconsistent with the object of the original charter nor those which impair rights that have vested thereunder."

The *ratio decidendi* of the New York Court of Appeals in the case of *Beloff* v. *Consolidated Edison Co.*, 300 N. Y. 11, cited by the trial court was, that consolidation of two utilities was in the public interest. The Legislature of the State of New York (not the state judiciary as in the present case) had by virtue of its power of eminent domain, enacted a law permitting the merger of two public utilities on consent of the Public Service Commission of the State of New York where one company owned more than 95% of the shares of the other. The Court of Appeals held that where the public welfare was to be served by a merger effected pursuant to the enactment, a dissenting minority stockholder had to yield up his vested rights, and that he bought his shares subject to the power of the legislature to alter such rights. In the *Beloff* case, the dissenter was offered $135 per share at the time of the merger, which he could take without litigation if he chose not to take the

new shares offered him. Were it not for the fact that a public purpose was to be served by the merger, it is clear from the decision of this Court in *Treigle* v. *Acme Homestead Assn.* (1936), 297 U. S. 189, that the merger in the *Beloff* case would have been illegal. This Court said at page 196:

> "The statute merely attempts for no discernible public purpose, the abrogation of contracts between members of the association, lawful when made. This cannot be done under the guise of amending the charter powers of the corporation."

In the instant case, the public welfare of the State of New York is not involved. No public purpose is to be served. No legislative action has intervened. On the contrary, a self-seeking group of "A" stockholders, bent on defeating the Hoe Plan of Readjustment in Bankruptcy, which was approved by the solemn decree of the United States District Court, has succeeding in destroying the cumulative voting rights of the common stockholders and their ultimate right to take over the corporate control as outlined in the Plan. These vested rights of the common stockholders have been taken away under a masquerade of consolidation of Hoe, with a phantom called Hoe Export Import Corporation, a mere piece of paper, purchased at an expenditure of $50. This Court should not permit such a transparent and tawdry device to defeat the supreme law of the land.

That consolidation was adopted as a device to evade the provisions of the Plan of Readjustment so as to deprive the common stockholders of cumulative and other voting rights without their consent, appears conclusively from the following excerpts from the Minutes of the Directors Meeting held on June 28, 1950, fully two weeks before Hoe Export Import Corporation was organized at a cost of $50 by its chairman of the Board of Directors and General Counsel Cullom.

> "The Chairman then stated that he felt that existing conditions made it advisable for him to invite con-

sideration of a possible plan of re-capitalization. • • • *Mr. Cullom stated that he came to the conclusion that re-capitalization was not feasible on a basis of voluntary consent of all three classes of stock*" (R. 527).

• • •

"Mr. Cullom stated that thirty or more plans had been examined in recent months and that certain groups representing the common stock had been particularly vocal in this connection" (R. 528).

"Mr. Cullom then proceeded to a discussion of the evil effects upon the Company of cumulative voting" (R. 529).

• • •

"He then stated that, in view of the impossibility of obtaining the consent of two-thirds of the Common stock on a plan of recapitalization which would meet the approval of the A, he suggested that a consolidation with another corporation, perhaps a wholly-owned subsidiary, be effected, pursuant to Section 86 of the N. Y. Stock Corporation Law. He read to the meeting excerpts from Section 5-K of the certificate of incorporation, as amended, directing attention to the provision thereof to the effect that all voting rights were vested in the A stock (except to elect two directors and vote on dissolution) and that the Common stock was 'specifically excluded' from voting upon 'consolidation pursuant to Section 86 of the Stock Corporation Law.' In the opinion of counsel, neither Common nor B would have the right to vote upon such a consolidation" (R. 532).

In stating his concept of "The Issue" before this Court Respondents' Counsel Cullom asserts:

"The entire case therefore comes down to this simple proposition: Petitioner contends that there are two permissible alternatives, i. e., recapitalization through

consolidation under section 86; or by amendment under section 35 (the common stock had renounced its right to vote on either); and that the defendants chose the former rather than the latter which petitioner prefers; *ergo* fraud."

This is a wholly misleading statement of the issue.

FIRST: Former section 36 of the Stock Corporation Law was repealed by Laws of New York 1949 c. 805, sec. 1, effective Sept. 1, 1949; and, effective on that same date, sec. 10, c. 805, Laws of New York 1949, added a new Section 35 to the Stock Corporation Law, and provided in an amended Section 51 thereof, "that the holders of all outstanding shares whose rights will * * * be adversely affected by such action (*i. e.* reclassification under Section 35) shall be entitled to vote, * * * in either event *regardless of any provision to the contrary in the certificate of incorporation or other certificate filed pursuant to law.*" (Italics added.) Hence, one of the two so-called alternatives was not permissible without the consent of the common stockholders, which Mr. Cullom had previously told the Board was impossible to obtain (R. 532).

SECOND: With regard to the other so-called permissible alternative, the correct statement of Petitioner's contention is as follows:

On June 25, 1935, the United States District Court ORDERED, ADJUDGED AND DECREED * * *(R. 444-462)

"5. By orders dated May 15, 1935, June 5, 1935, and June 10, 1935, made, and entered, after hearings duly adjourned, and by an order of the Court of even date herewith, the Court has approved the following documents for the consummation of the Plan after finding that such documents had been prepared by counsel for the Debtor and duly approved by the Board of Direc-

tors or the Committee of the Board of Directors as required by the Plan:

* * *

(b) Certificate of increase of number of shares, of change of all its previously authorized shares without par value, issued and unissued, into the same number of shares with par value of classification of shares, with par value, and of change of the statement respecting its capital contained in the Certificate of Incorporation of the Debtor;

(c) Certificate of increase of number of directors:"

The foregoing Decree of the Federal Court, approving the amended Certificate of Incorporation, merely carried out the Plan of Readjustment; and the right of the Debtor to consolidate under Section 86 without the common stockholders' approval—upon which Respondents base their entire defense—was contained in the very same Plan of Readjustment and Certificate of Change and Increase which unequivocally established the right of cumulative voting, and which provided that the common stockholders' rights to vote cumulatively for directors, could not be impaired without their majority consent. (These rights are now characterized by Respondents as immaterial exceptions.) Petitioner therefore contends that resort cannot lawfully be had to a consolidation under section 86 of the Stock Corporation Law to evade the provisions of the Plan of Readjustment and that such "consolidation," depriving the common stockholders of their cumulative and other voting rights, could not be accomplished without the consent of the majority of the Common stockholders and the approval of the Federal District Court, first obtained on notice.

POINT IV

The Federal questions were saved for review by presentation at the trial court, at the Appellate Division and at the Court of Appeals of the State of New York. Petitioner is prepared to accept Respondents' summary of the Federal question as it appears in the respondents' briefs below, as a basis for the granting of a writ by this Court.

Respondents urge as ground for the denial of the Writ of Certiorari, that "No certificate has been obtained from the highest state court to the effect that a Federal question was raised and decided. The decision passed on non-Federal grounds" (Resp. Br., p. 27). Petitioner annexes to the appendix a letter from Raymond J. Cannon, Clerk of the Court of Appeals, stating that such is not the practice of the Court of Appeals, and that it is its practice to certify the motion papers for leave to appeal and any opposition papers. Accordingly petitioner has obtained certified copies of the briefs and moving papers of both parties at the Court of Appeals and at the Appellate Division, which are to be filed with the Court simultaneously with this Brief. Pertinent extracts from these papers are printed in the appendix. They show that the Federal questions were at all times before the State Courts and consequently are saved for review by this Court.

In order however to avoid a prolix discussion on the subject in this Reply Brief, Petitioner is prepared to accept, with slight modification Respondents' own summary of Petitioner's presentation of the Federal question appearing at p. 62 of the Respondents' Brief at the Appellate Division and page 58 of the Respondents' Brief at the Court of Appeals. In both of these State Courts, identical language was used by Respondents' Counsel to describe the Federal Question presented by Petitioner in every court before which Petitioner has appeared. It is as follows:

"In his brief Katz urges that this consolidation violates the plan of reorganization approved by the Federal Court in the Hoe 77 B proceeding of 1935—or, to state it differently, that the certificate of incorporation, as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means."

Petitioner suggests the following modification of Respondents' summary of his presentation of the Federal Question as the basis for the issuance of the Writ of Certiorari herein.

The Federal Questions presented (as amended): Whether the consolidation of Hoe with its subsidiary violates its Plan of Readjustment and Amended Certificate of Incorporation both approved by the Decree of the United States District Court in the 77 B Proceeding of 1935, by depriving the common stockholders of their vested cumulative and other voting rights without their majority consent, and without the approval of the United States District Court, both of which are immutably required by said Plan and by the Decree of the U. S. District Court approving it?

POINT V

Since the constitutional question was not the sole question presented to the New York Court of Appeals for its consideration Petitioner was not entitled to appeal to that court as a matter of right and the denial by it—the highest court of appellate jurisdiction of the State of New York—of Petitioner's motion for leave to appeal requires that the Writ of Certiorari issue to the Appellate Division, the intermediate appellate court which rendered the final judgment herein.

In the case of *Lewis* v. *Board of Education*, 275 N. Y. 481 the Court of Appeals of the State of New York dismissed an appeal, assertedly taken by the appellant as of

right, under the provisions of section 588 of the New York Civil Practice Act, because there was "directly involved the construction of the constitution of the state or of the United States." The "Appeal (was) dismissed with costs, on the ground that the constitutional question is not the sole question involved in the appeal."

A mere examination of the papers submitted by both parties at the Court of Appeals shows that more was involved in the appeal to the Court of Appeals than a constitutional question. Indeed, Respondents urge such State grounds of decision as a basis for the denial of this petition. To be appealable to the Court of Appeals as of right, the judgment must have been addressed exclusively to a constitutional question, under the State or Federal Constitutions. Such is the clear holding of the Court of Appeals in *Lewis* v. *Board of Education, supra.*

In *Southern Electric Co.* v. *Beha,* 269 U. S. 186, cited by Respondents at pages 15-17 of their brief, this Court, by Taft, Ch. J., held that a Writ of Certiorari did not lie to this Court where "no application was made for leave to appeal to the Court of Appeals" (p. 189). This all-important statement is omitted from the passage of Chief Justice Taft's opinion quoted at page 16 of the Respondents' Brief.

Since under the decisions of the Court of Appeals of the State of New York, application for leave to appeal was necessary, and since Petitioner made such application without success, the denial by the Court of Appeals of Petitioner's motion for leave to appeal clearly leaves the Appellate Division, First Department, as the state court to which the Writ of Certiorari should issue herein. *American Railway Express Co.* v. *Levee,* 263 U. S. 19.

POINT VI

Federal Judge McGohey ruled on November 6, 1951, "the petitioner sought and failed to justify the intervention of the State Court. He cannot, while pressing his appeal there, relitigate the same issues in this Court. (*Davega City Radio Inc.* v. *Boland*, D. C. S. D. N. Y., 23 F. Supp. 969, 970.)" His decision dismissing the Petitioner's application for relief in the Federal Courts is therefore not *res judicata* in the very appellate courts to which Petitioner appealed, pursuant to the suggestion of Judge McGohey, nor in this Court, where the State Court judgments are sought to be reviewed.

Respondents' counsel in the brief submitted in opposition to this application has tried to make a game of "Catch the Fox" out of this litigation. In his affidavit submitted in opposition to the motion for injunction *pendente lite* the said Neil P. Cullom swore "If, therefore, plaintiff has any quarrel with the restrictions upon the Common Stock's right to vote, it is with the Federal Court and not with this management" (see appendix).

When Petitioner, following the suggestion contained in Mr. Cullom's affidavit, applied to the Federal Court for an injunction to restrain the violation of the Federal Court decrees in the Bankruptcy Proceeding, Mr. Cullom not only endeavored to punish the Petitioner and his Attorney for contempt of Court (see affidavit annexed to petition), but he also contended that the appeal to the State Appellate Courts was the exclusive remedy of the petitioner.

Judge McGohey on November 8, 1950 dismissed the Petitioner's application for an injunction and relegated the Petitioner to his appeal to the State Courts. His opinion quoted in the headnote makes that clear. Petitioner therefore filed his appeal to the Appellate Division on November 16, 1950 (R. 5-6).

Petitioner attempted to appeal to the Circuit Court of Appeals for the Second Circuit thereafter, but that court dismissed his appeal. It would not amend its order of dismissal on petition for rehearing, so as to make clear the ground of its dismissal. In the affidavit annexed to this brief as an appendix, it is shown that because the Circuit Court of Appeals refused to clarify the basis of its decision, a petition for a Writ of Certiorari did not lie to this Court from the Circuit Court's order of dismissal.

In every court to which the Petitioner has applied for relief, the Respondents have urged that Petitioner belonged in another court. When he has arrived at that court it has been urged that the adjudication of another court bars relief. In the Federal Court before Judge McGohey it was asserted that the decision of Judge Cohalan barred relief before Judge McGohey. The only avenue of redress it was claimed was by appeal to the State Appellate Courts. Judge McGohey relegated Petitioner to his appeal to the State Courts. Now it is asserted that this Court is bound by the decision of Judge McGohey as *res judicata.* The law is not a game of "Catch the Fox." It is submitted that when the fox is at last at bay, he should be compelled to meet the issue and not be permitted to escape on any trumped-up issue of *res judicata.*

While it is true that Judge McGohey asserted as an additional basis for relegating Petitioner to his remedy by way of appeal to the State Court's that "this reorganized debtor was in 1935 sent out into the state as fully subject to state law as though the court had had nothing to do with its creation" citing *In re Ambassador Hotel Corp.* v. *Peerless W. & V. Mach. Corp.,* 2 Cir., 143 F. 2nd 938, the foregoing citation was dictum and was overruled by the Second Circuit in *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.,* 186 Fed. 2nd 525, decided February 1, 1951.

POINT VII

The non Federal grounds assigned by the State Courts as a basis for decision are not adequate to defeat review by this Court. The failure or refusal of the State Courts to pass upon the Federal issues, which would have been and are decisive of the entire litigation, "may be properly regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question".

Enterprise Irrig. Dist. v. *Farmer's Mutual Canal Co.*, 243 U. S. 157;
Lawrence v. *State Commission*, 286 U. S. 276, page 282.

The Trial Court fully understood that the 1935 Plan of Readjustment in Bankruptcy was controlling on everyone and on Petitioner's cumulative voting rights as of the date of the trial in October 1950. Nevertheless the Trial Court failed and refused to pass upon the Federal issues.

At Record page 282 Mr. Cullom, Respondent's counsel and author of the 1950 Plan of consolidation, offered in evidence an exhibit (Defendant Hoe's Exhibit AU). In ruling upon the admissibility of this document the Trial Court said (R. 283):

> "The Court: *I understood that the amendment, which was practically at my direction because I thought he had pleaded himself out of court without the amendment, was to the effect that the 1935 action of the Federal Court, and which had occurred here was controlling on everyone. I further understood you all agreed that that Federal matter was controlling. I don't see that I need take anything else.*"

By cross examination of Charles E. Littleton, Secretary of the Respondent Hoe, Petitioner proved that cumulative

voting by the Common stockholders came into effect in 1945 under the Plan of Readjustment in Bankruptcy, dated 1935 (R. 283-287). Ten full years had elapsed before it became effective.

"By Mr. Garfield (R. 283):

Q. Is it not a fact that the preferred stock, prior preferred stock referred to on page 22 and 23 of Plaintiff's Exhibit 1—I will show you this copy—

Mr. Cullom: *I think we can cover that by concession.*

The Court: *What is this?*

Mr. Cullom: *He asked me to concede that the prior preferred stock of this corporation was retired at various times up to the fiscal year of 1945* (R. 284).

The Court: Gentlemen, you both, apparently, want to go back into the past of this corporation. I don't think it is necessary and I think you are unduly prolonging this litigation. *I am confronted with a problem of deciding whether, on a certain day in the year 1950 when this new plan was adopted, anything illegal or unfair in the eyes of a court of equity to the common stockholders, was done. That is my only problem.* What was done that was illegal or praiseworthy on some other occasion is of no moment here.

Mr. Garfield: *My question is directed directly to that proposition.*

The Court: *To 1950?*

Mr. Garfield: *Yes, directly to this day, to this very minute.*

The Court: *All right, ask a new question.*

Q. *Has the prior referred stock been paid in full and liquidated?*

The Court: Answer, yes or no.

A. *At that time, yes.*

Q. *In 1946?* A. *Yes.*
Q. Since 1946—

The Court: *What has that got to do with how things existed in 1950?*

Mr. Garfield: *Because the plan provides, the plan of the United States District Court provides, that the second the prior preferred stock has been eliminated the common stockholders have the right to elect two directors, voting cumulatively.*

The Court: *In other words, by the order of reorganization in the United States District Court this becomes of moment in deciding conditions as they were in 1950; is that it?*

Mr. Garfield: *Exactly.*

The Court: *Then, I will take it. Is that right?*

Mr. Cullom: *Wasn't that 1945?*

The Witness: *The retirement, I think, was completed in 1945.*

Q. When did the A directors, for the first time, elect nine directors? A. I have a date in mind, but it was shortly before that retirement.

Q. *You were in the employ of the defendant, R. Hoe & Co., Inc., during all of the time that it was in the 77-B proceeding, were you not?* A. *I was.*

Q. You were familiar with this plan of reorganization? A. I was.

Q. And were you familiar with the provisions of page 22, the first paragraph, paragraph 1, under the heading "Miscellaneous"? A. Yes.

Q. *And since the year 1946, have not the common stockholders elected two directors voting cumulatively?* A. *Yes.*"

The foregoing testimony, coupled with the concession that no order of the Bankruptcy Court was obtained modifying the Plan of Readjustment (R. 316) left the Trial Court with a single question of Federal law which would

have been determinative of the entire litigation, and which the Trial Justice himself had declared, during the trial, to be "controlling" (R. 283).

Neither the Trial Court nor the Appellate Division placed their decisions upon the Federal Questions raised by Petitioner's Second Amended Complaint, which are amply supported by the proof and concessions. Indeed that there was a studied evasion of the Federal Questions becomes apparent from an examination of the opinions rendered by both said Courts. It is to be borne in mind that the Appellate Division did not sustain every contention of the Trial Justice. It placed its decision on a concurrence with the Trial Court's finding that (1) there was no showing of fraud and (2) the balancing of equities required affirmance of the judgment. Let us however proceed upon the assumption erroneously advanced by Respondents, *i. e.*, that the Appellate Division adopted all of the findings of the Trial Justice. It will be found that the alleged state grounds of decision are not adequate to defeat the Federal questions which were duly raised in all the State Courts and which if decided, would have been dispositive of the case without touching upon any State question. In making this assertion we confine ourselves to the Amended Federal Question appearing at page 19 of this Reply Brief as follows.

THE FEDERAL QUESTION PRESENTED (as amended)

Whether the consolidation of Hoe with its subsidiary, violates its Plan of Readjustment and Amended Certificate of Incorporation both approved by the decree of the United States District Court in the 77B proceeding of 1935, by depriving the common stockholders of their vested cumulative and other voting rights without their majority consent, and without the approval of the United States District Court, both of which are immutably re-

quired by said Plan and by the decree of the United States District Court approving it?

Here then are the six non-Federal grounds of decision as summarized at page 22 of the Respondents' Brief:

> FIRST: That under the law of New York (Section 21, Stock Corporation Law) Plaintiffs have an adequate remedy at law in the form of appraisal;
>
> SECOND: There was no proof of fraud;
>
> THIRD: Under the terms of the company's charter, "The present common stockholders have no right to vote on the proposed consolidation";
>
> FOURTH: There was no "ruse" or subterfuge "by means of which the provisions of Section 35 was being avoided";
>
> FIFTH: There was a complete failure of proof as to any unfairness to the common stock;
>
> SIXTH: That it is settled law of this state that "in the absence of a very plain showing of either fraud or improvidence" the court "will not substitute its judgment for that of the directors or stockholders as to the economic wisdom of plans of this nature".

In considering the above grounds of State decision it is well to bear in mind this Court's repeated rulings that the Supreme Law of the land as embodied in the Constitution of the United States and statutory enactments pursuant thereto such as the Anti-trust and Bankruptcy laws must prevail over State laws regulating corporate affairs and conduct.

> *Northern Securities Company* v. *United States,* 193 U. S. 197;
> *Stoll* v. *Gottlieb,* 305 U. S. 165;
> *Voeller* v. *Neilston Warehouse Co.,* 311 U. S. 531, 535.

Nothing in the cases cited by Respondents in Point III of their brief detracts one iota from this principle. Thus in *Wood* v. *Chesborough,* 228 U. S. 672, the non-Federal grounds of decision were the doctrine of laches and the State Statute of limitations which were adequate, in and of themselves to support the State Court decision.

This Court said in *Wood* v. *Chesborough, supra,* at page 677, immediately following the portion of its decision quoted at page 24 of Respondents' Brief.

> "* * * *the sufficiency of the Federal right set up cannot be evaded if necessary to the determination of the case, and, it may be admitted, that of such necessity this court must in each instance decide* (citing cases). In Cresswill v. Grand Lodge K. P. 225 U. S. 246 it is decided that this court will review the findings of fact by a state court (a) where the Federal right was denied as a result of them and there is no evidence to support them, a question of law hence resulting for decision; and (b) where a conclusion of law as to a Federal right and finding of fact are so intermingled as to cause it to be necessary, for the purpose of passing on the Federal question, to analyze and dissect the facts. To the extent necessary to do so the power exists as a necessary incident to a decision upon the claim of denial of the Federal right." (Italics ours.)

In *Fox Film Corporation* v. *Muller,* 296 U. S. 207, the following significant quotation explanatory of this Court's decision in that case, was omitted from Respondents' Brief (p. 23):

> "Whether the provisions of a contract are non-severable so that if one be held invalid the other must fall with it is clearly a question of general and not Federal law * * *. It follows that the non-Federal ground is adequate to sustain the judgment.

> The rule announced in Enterprise Irrig. Dist. v. Farmers Mutual Canal Co., 243 U. S. 157 and other cases, to the effect that our jurisdiction attaches where the non-Federal ground is so interwoven with the other as not to be independent matters, does not apply."

An analysis of *Wall* v. *Parrott Silver & Copper Co.*, 244 U. S. 407, cited by Respondents at 24 of their Brief clearly shows the shallow nature of Respondents' argument. Justice Clarke's opinion indicates that two distinct questions were there presented, one cognizable under State law and the other Federal. Each was independent of the other. They were:

(1) Was there a fraudulent dissipation and depreciation of assets to the detriment of a minority stockholder for which he had a cause of action under Montana law?

(2) Was the Montana Statute, which required the minority stockholder to take on appraisal the value of his shares at the date of appraisal, without giving effect to the value of property fraudulently dissipated, a deprivation of the Petitioner's property in violation of the Fourteenth Amendment?

The dictum of this Court quoted at page 25 of the Respondents' Brief was not the basis of decision, for immediately following the quoted statement, this Court said:

> "We prefer not to have the case go off on this rule * * *. This record does not call upon us to examine into this challenge * * * for the reason that the appellants, by their action in initiating a proceeding for the valuation of their stock, pursuant to these statutes, which is still pending, waived their right to assail the validity of them."

This brings us directly to the First ground of non-federal decision of the trial Court *i. e.* "That under the laws of New York (Section 21 of the Stock Corporation Law) plaintiffs have an adequate remedy at law in the form of appraisal." This contention is directly the opposite of the reason for dismissal of the writ by this Court in *Wall* v. *Parrott Siver & Copper Co., supra.* Petitioner did not file for appraisal, nor did he take a single step inconsistent with his contention that the Consolidation was void under the Plan of Readjustment in Bankruptcy and that it therefore offended the Supreme Law of the land.

In the case of *Breslav* v. *N. Y. & Queens Elec. Light & Power Co.*, 249 App. Div. 190 (unanimously affirmed, 273 N. Y. 593), the Appellate Division, Second Department, said with respect to a similar contention:

> "The remedy of appraisal under section 38, which the learned Special Term said was available to plaintiff, applies only if the amendment alters the preferential rights of outstanding shares. *As heretofore indicated, the proposed amendment* does not alter any preferential rights running with the shares but *destroys a vested property right. Defendants admit the remedy of appraisal is not an adequate or even an available remedy if the proposed change is not authorized.* * * *
> * * * this reserved power (to alter corporate charters) is not unlimited, and its exercise is subject to the restrictions and restraints by the other provisions of the State and Federal Constitutions. Due process of law must be observed and vested property rights and obligations of contracts must not be destroyed or impaired. (Coombes v. Getz, 285 U. S. 434; Philips Petroleum Co. v. Jenkins, 297 U. S. 629.)"

It is to be noted that although the Respondents urged at the Appellate Division that "Appellants have an adequate remedy at law: appraisal constitutes the exclusive

remedy of a stockholder not wishing to participate in the plan", that the Appellate Division did not accept this argument as a basis for decision. Instead, it adopted the Trial Court's finding that there was no fraud.

The remaining five grounds of decision of the Trial Court and the grounds of decision by the Appellate Division have been fully covered in the Petition. They may all be linked in one category, namely that there was no fraud shown. The Certified copies of the Petitioner's and Respondents' Briefs at the Appellate Division which are submitted herewith, show that the Federal Questions would have been conclusive over all the alleged non-federal questions. Petitioner urged *at both* the Appellate Division and the Court of Appeals.

> **That "the real purpose for the organization of Hoe Export-Import Corporation was to use it as a fraudulent device to deprive the common stockholders of Hoe of their right to take over the ultimate control of Hoe from the 'A' stockholders, under the provisions of the Plan of Readjustment in Bankruptcy, without affording the common stockholder the right to vote thereon. The Federal Court's decrees being judgments *in rem* are *res judicata* and are binding on all Courts, parties and their privies."**

Respondents' answer to the foregoing point has been the same at both the Appellate Division and at the Court of Appeals. Indeed the almost identical language was employed in both courts, *i. e.*

"POINT VII

THERE HAS BEEN NO VIOLATION OF THE FEDERAL COURT ORDERS.

In his brief Katz argues that this consolidation violates the plan of reorganization approved by the Federal Court in the Hoe 77 B proceeding of 1935—or, to state it differently, that the certificate of incorporation,

as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means. To state the claim is to answer it.

Both lower courts and the Federal courts, have dismissed the contention as unsound;"

It is respectfully submitted that no state court has passed upon the above Federal question, let alone dismissed it as unsound. And as for Judge McGohey's decision, as previously shown, he merely relegated the petitioner to his appeal to the State Courts. Everything else that he said was mere *dictum.*

The evasion of the Federal questions by the State courts being fully shown, since the said questions would have been determinative of the controversy, the alleged non-federal grounds of decision do not bar a review by this court.

Conclusion

Respondents' Counsel, Neil P. Cullom, author of the 1950 Plan of Consolidation, in order to avoid answering before this Court for his studied violation of the 1935 Federal Court decrees and the impairment of the vested rights of the common stockholders, resorts to a vicious *argumentum ad hominem,* and an attack upon the honor of Petitioner and his counsel: He has falsely insinuated that Petitioner's Counsel has filed the petition herein without the knowledge of petitioner (R. Br., p. 13); falsely insinuated that petitioner is not "now a *bona fide* beneficial, owner of Hoe stock" (R. Br., 14) and falsely accused petitioner's counsel of "manufacturing out of the whole cloth a quotation from Wormser on the Disregard of the Corporate Fiction" (p. 18). (See pages 13 and 14 Respts. Br.)

A measure of the man responsible for this intemperate language may be gathered from what the Appellate Divi-

sion, First Department said of him in October, 1922, in the case of *Pelzer* v. *Perry,* 203 App. Div. 58, 60, in which case the same individual, Neil P. Cullom, was counsel for the Respondent. Justice Page, writing for the unanimous bench, said:

> "We regret to note that counsel for the respondent in each of the four briefs which he has filed on the various appeals in this case has adverted to a matter that formed no part of the record on these appeals, and used intemperate and impertinent language intended to reflect upon one of the justices. Because of this matter being in the briefs, the four briefs will be ordered stricken from the files, and the counsel is admonished that a repetition of the offense will call for more drastic action."

Anyone looking at the quoted matter on page 18 of the Petition can see that it is an extract from Petitioner's briefs below. It was not claimed to be nor is it a quotation from Wormser, although Wormser is cited as authority for the point urged. What Wormser actually did say is so much more potent than anything said by Petitioner, that it is well to conclude this brief with Wormser's actual words.

> "Oftentimes the corporate form of organization is adopted in an endeavor to evade a statute or modify an intent. A forceful example is to be found in the learned decision of the United States Supreme Court disregarding the theory of corporate entity in enforcing the 'commodities clause' of the Hepburn Act. (*U. S.* v. *Lehigh Valley R. R. Co.* [1911], 220 U. S. 257, 31 Sup. Ct. 387 [per White, C. J.]). The commodities clause provides that:
>
> > "'It shall be unlawful for any railroad company to transport from any State * * * to any other State * * * any article * * * manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect * * *.'

"The government, in the first suit, alleged that the Lehigh Valley Railroad Company owned stock in a coal company whose goods it was carrying. On demurrer, it was held that no violation of the statute was thereby shown; the court interpreted 'interest, direct or indirect' as meaning only a legal or equitable interest in the transported articles. (*U. S.* v. *Delaware & Hudson Co.* [1909], 213 U. S. 366, esp. 413.) The government, after this first and very serious blow, presented an amended complaint in which it was set forth, in addition to the allegations of the prior complaint, that the railroad company was using the coal company merely as a sham, a device and a dummy, in order to evade the provisions of the act.

"The court held that no such evasion could succeed, and, disregarding the corporate concept and looking at the substance and reality of things, decided that it was within its jurisdiction to issue an injunction. (1911, 220 U. S. 257 *et seq.*) It is submitted that every dictate of sound reason warranted the court in holding as it did.

"The late Justice Brewer in his notable concurring opinion in *Northern Securities Company* v. *United States* (1903), 193 U. S. 197, 360-4, pointed out that, where a corporation, was organized merely as a convenient means of combining separate railroad properties under one control the court could shake aside the veil of entity and regard the combination as just 'as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates.' In other words, the plain intent and purport of the Sherman Anti-Trust Act cannot be defeated by a resort to the sham and subterfuge of incorporation."

* * *

"The burning words of a late Chancellor of New Jersey should be borne in mind by every corporation lawyer who seeks to use the concept of corporate

entity to defeat the end for which it was invented: (*Stockton* v. *Central R. R. Co.* (1892), 50 N. J. Eq. 52, 75-76, citing abundant authority.)

"'* * * A more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons. * * *' It must not be thought that courts are powerless to strip off disguises that are designed to thwart the purposes of the law. The mere suggestion of such a condition is an insult to the intelligence of the judiciary. Whenever such disguises are made apparent, they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear.

"A recent decision, following numerous others, by the United States Supreme Court, speaking through the late Justice Harlan, emphasizes another phase of the disregard of the corporate entity where the corporation is a mere shift to evade the law. In that case, a corporation was formed for the sole purpose of attempting to get certain litigation into the federal courts and thus of invoking federal rather than state jurisdiction. The entity was impatiently, almost contemptuously, disregarded. (*Miller and Lux* v. *East Side Canal, etc., Company* (1908), 211 U. S. 293, and cases cited.)

"Further illustrations *ad infinitum* might be given: they would serve not so much further to fortify this principle as to introduce needless repetition."

Petitioner respectfully prays that his Petition for a Writ of Certiorari be granted.

Respectfully submitted,

GUSTAVE B. GARFIELD,
Attorney for the Petitioner.

Appendix.

Affidavit of Nathan Katz.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & CO., INC., similarly situated,

Petitioner,

against

R. HOE & CO., INC., *et al.*,

Respondents.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

NATHAN KATZ, being duly sworn, deposes and says:

I am the Petitioner herein. Contrary to the insinuation appearing at pages 13 and 14 of Respondents' brief that the petition was filed by my attorney without my authority or knowledge, I solemnly state to this Court that the petition was filed with my full knowledge and authority and that I earnestly seek and pray that a Writ of Certiorari issue herein.

Respondents further assert at page 14 of their brief:

> "There is no evidence that petitioner even knows that this application is being made or that he is now a *bona fide* beneficial, owner of Hoe stock."

The fact is that I am now and since December 23, 1949, at all times have been a *bona fide* beneficial owner of 500 shares of the common stock of R. Hoe & Co., Inc.

The affidavit of Charles E. Littleton, secretary of Respondent Hoe, asserts that I bought my shares "at just about the time this plan was being considered." I solemnly declare that at the time I purchased these shares, purely as an investment, I had not the slightest knowledge of any contemplated plan of recapitalization or consolidation in any form whatsoever. Indeed, plaintiff's president, the Respondent Auer, addressed a letter to all stockholders on December 1, 1949, in which he said:

> "It has come to our attention that there have been rumors of an impending recapitalization. No recapitalization plan has been considered by our Board since the adoption of the plan placed in effect early in 1947."

A copy of this letter was sent to me by Mr. Auer immediately after I became a stockholder; late in December, 1949.

At a meeting of the Board of Directors of Respondent Hoe, held on May 24, 1950, it was

> "Resolved that the President be authorized to issue the following announcement:
>
> The Directors of the Company have approved no plan of re-capitalization and there is no immediate prospect of such approval" (R. 523).

The first and only knowledge that I obtained of the proposed plan of consolidation was a published statement which appeared in the New York daily press shortly after July 14, 1950. The first official notice I received of the proposed action was the company's proxy statement

(Plaintiff's Exhibit A, R. 482-3) which was mailed to me on or about August 8, 1950.

If any plan of consolidation or reclassification was being considered, I was not only without knowledge of that fact, but was misled to the contrary by the repeated assertions of Respondent Hoe's officers.

At page 35 of my petition, asserting the importance of the issues herein, it is stated

> "It is of tremendous importance to stockholders, large and small alike, that the rights of cumulative voting granted by contract to stockholders be protected by this court as a vested property right, so that stockholders like the holders of 93,000 common shares in this case will not again be compelled to risk a lawsuit to perserve their voting rights and thereby waive appraisal, doubtful as it may be as a remedy.
>
> "From the sheer monetary point of view, the petitioner and the holders of 93,000 common shares of Hoe have been deprived of property without compensation worth over $1,500,000. This is arrived at as follows:
>
> "Considering that there were 95,977 shares of A stock outstanding at the time of the consolidation and that two shares of new common stock (having a present market value of eight dollars per share), were issued without lawful right, for each A share outstanding, the amount unlawfully taken was $1,535,952. If it is impossible to unscramble the omelette, as ruled by the Appellate Division, the common stockholders are clearly entitled to an award of damages for such unlawful taking of their property."

Mr. Littleton culls one short passage from the foregoing statement (Respondents' Brief, p. 50) and asserts that it

is utterly false; but he presents nothing to controvert the accuracy of my above-quoted calculation. Instead, he asserts "there is not one stockholder who joins him in this effort to prolong this litigation and no one will have anything to do with this strike suit" (Respondents' Brief, page 50).

In this connection, I respectfully call the attention of this Court to the fact that when proof was offered upon the trial indicating "that neither the plaintiff nor, for that matter, the defendant Martin, stand alone," the Trial Court ruled as follows:

> "The Court: *I am not interested in that. If a man stands alone and still has rights, as far as I can, I will enforce those rights. My ruling is, I don't care about the number of people who may have taken a particular course at a particular time. If any one person is wronged, and that goes for your client and for the other plaintiffs here, by what was done, that is enough for me*" (R. 122-123).

That the record does not show the great number of common stockholders whose interests are being protected by this action, is entirely due to the Trial Court's ruling excluding such evidence.

This is not a strike suit. I have at all times since 1927 been a member in good standing of the Bar of the State of New York. Prior to the institution of this present suit, I have never commenced or participated in a stockholders' action, either as attorney or as party plaintiff. As I testified upon the trial of this action, no stockholder has paid or promised to pay my expenses for this litigation, either directly or indirectly (R. 68). I brought this action to protect my investment and to preserve my lawful property rights, and with no other motive whatsoever.

Appendix.

It is asserted by Respondents that this action is groundless and moot. This I deny. From the very outset of the litigation, I have prayed for a declaratory judgment declaring the proposed plan of consolidation unlawful, null and void under the Constitution of the United States. In my second amended complaint, served pursuant to the direction of the Trial Court, I prayed for

> "a declaratory judgment that the said proposed meeting, if it be held pending the trial of this action, is unlawful, null, void and of no effect in law, in violation of * * * the Constitution of the United States of America and Amendments 5 and 14 thereof, * * * and the plaintiff prays for such other alternative or different relief as may appear to be just and proper in the premises" (R. 15-16).

In my said second amended complaint, I alleged that the said "consolidation" was

> "in violation of the voting rights conferred upon the common stockholders as a class, by the decrees of the United States District Court for the Southern District of New York and the Plan of Reorganization therein set forth and incorporated dated March 1, 1935, and April 25, 1935, which decrees and Plan of Reorganization are heretofore referred to in paragraphs Second and Third hereof" (R. 14).

In paragraphs second and third of my second amended complaint, I set forth in detail the origin, history and nature of the class voting rights of the common stockholders including their right to vote upon any amendment of the certificate of incorporation which "shall be made which shall impair the right of the common stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the class voting

rights of the Common Stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence'' (R. 9-11). My complaint then proceeds to allege in concrete detail how these rights are sought to be destroyed by Respondents' consolidation plan (R. 14).

The identical issues posed by my second amended complaint, litigated upon the trial, and briefed at the Appellate Division and at the Court of Appeals, have been presented to this Court as the Federal Question sought to be reviewed by this petition. It is a question that has never been directly presented to this Court, although closely related questions have been decided by this Court in *Stoll* v. *Gottlieb,* 305 U. S. 165, sustaining the position taken by me.

Every stockholder who purchased the newly issued shares has purchased them with constructive if not actual notice of *lis pendens.* He has purchased shares issued unlawfully to the A stockholders. Such new purchasers are not before this Court. The Respondent directors seek to prevent an accounting for the new common shares unlawfully taken by them, by hiding behind the so-called innocent purchasers of these newly-issued shares. Despite the consummation of Respondents' plan, made possible only by virtue of the Appellate Division's *vacatur* of the stay against such consummation, Petitioner respectfully maintains his right to a declaratory judgment that the plan was null and void and in violation of the 1935 Plan of Readjustment.

If, therefore, it be adjudicated that a legal and actionable wrong has been done to me, the Petitioner, it was a legal and actionable wrong to all the common stockholders, and the appeal should not fail because of mootness, despite the complexity of the situation brought about by the *vacatur* of the stay by the Appellate Division and the

consequent consummation of the plan. This Court may well find and decree that the plan of "consolidation" was void *ab. initio;* and an accounting for the damages may still be ordered on behalf of the common stockholders as a class, should other equitable relief be deemed unavailing or impossible of rendition.

Approximately 67,000 shares of the common stock, out of a total of 160,000 shares, have been filed for appaisal, leaving about 93,000 shares which have not been so filed. It is this class, to the extent of some 93,000 shares, that your Petitioner represents by this class action. These shares are held by upwards of five hundred persons and firms scattered throughout the United States. I believe that I, as an attorney in good standing in the Courts of the State of New York since 1927, have the requisite integrity to represent them fairly and adequately under the supervision of the Court. These common stockholders, whom your deponent represents as plaintiff in this action, had vested property rights under the plan of readjustment long before the new common stockholders acquired their shares. As such, they are entitled either to a declaratory judgment that the plan of consolidation was void *ab. initio,* or to judgment for an accounting for the property of which they have been unlawfully deprived. I therefore respectfully pray that my petition for a writ of certiorari be granted.

NATHAN KATZ.

Sworn to before me this
1st day of November, 1951.

JEANETTE OETTINGER
Notary Public, State of New York
No. 24-2944400
Qualified in Kings County
Cert. filed with New York County Clerk Office
Commission expires March 30, 1953

Appendix.

Affidavit of Gustave B. Garfield.

SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 360

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & Co., INC., similarly situated,

Petitioner,

against

R. HOE & Co., INC., *et al.*,

Respondents.

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

GUSTAVE B. GARFIELD, being duly sworn, deposes and says:

I am the attorney for the Petitioner herein, duly admitted to practice in this Court.

It has been insinuated by Respondents that I have filed this petition without the knowledge and consent of the Petitioner (Respondents' brief, 13, 14). The insinuation is false.

It has been stated by Respondents' attorney

> "not only has petitioner gone far outside the record, but he and his counsel have even gone to the extreme of manufacturing out of whole cloth a quotation from

> Wormser on The Disregard of the Corporate Fiction (p. 18). The language there attributed to Wormser was never uttered by him."

I deny the accusation and assert that there is no foundation whatsoever for this baseless attack against my integrity. I have not gone outside the record nor did I manufacture a quotation from Wormser. I did not quote Wormser in the Petition for a Writ, at all. I merely cited him as authority.

It is perhaps because Respondents' counsel, Neil P. Cullom has been criticized by the New York Appellate Division, First Department, in the case of *Pelzer* v. *Perry*, 203 App. Div. 58, p. 60 [1922], because he "has adverted to a matter that formed no part of the record on these appeals, and used intemperate and impertinent language" that he seeks to cast me in the same role in which he has been thus judicially cast. Though he was in that same decision then "admonished that a repetition of the offense will call for more drastic action", he nevertheless continues the same pattern of behavior.

An examination of the matter quoted at page 18 of the Petition shows that it was there stated as the point made by me "in every State Court to which the matter has been submitted." The quoted matter is from my own briefs below and is as follows:

> "The Court should pierce the corporate veil of the recently formed dummy, Hoe Export Import Corporation, disregard its form as a subsidiary, and regard it in substance as an instrument or device conceived and created by the Class A directors of R. Hoe & Co., Inc. for the sole purpose of the evasion of the law which gives the common stockholders the right to vote upon the proposed consolidation."

How ridiculous and unfair to charge that this sentence was intended to be read by this Court as a quotation from a textbook published in 1927, as stated in the index (p. v.) to the petition!

The same pattern of behavior has been followed by Respondents' attorney throughout this litigation. Thus, in an affidavit submitted by him in opposition to a motion for an injunction *pendente lite,* sworn to on August 23, 1950, Mr. Cullom swore *inter alia:*

> "(B) That the Court at the close of the 77-B bankruptcy proceeding had been inclined to eliminate the common stock completely and, when finally prevailed upon not to do so, had insisted that the charter be so drawn as to give it the absolute minimum of power and security. * * *
>
> "(e) Confiscation of plaintiff's property—The claims set forth in the complaint that the consummation of the plan would involve a confiscation of plaintiff's property in violation of the provisions of the State and Federal Constitution are not only unsound in law, but false in fact. * * *
>
> "If, therefore, plaintiff has any quarrel with the restrictions upon the common stock's right to vote, it is with the Federal Court and not with this management."

After reading Mr. Cullom's affidavit, your deponent ascertained the falsity of its assertion that restrictions placed upon the common stock prevented it from voting upon the proposed amendment which sought to deprive the common stockholders of their cumulative voting rights. Your deponent thereupon orally asserted the falsity of that statement, in his argument before the Appellate Division, First Department; and that Court unanimously

stayed the consummation of the plan pending the trial of the action (see Decision, p. 47, Petition).

Thereafter, petitioner applied to the United States District Court for relief, taking at his word Mr. Cullom's sworn statement that "if plaintiff has any quarrel with the restrictions upon the common stock's right to vote, it is with the Federal Court and not with this management."

Mr. Cullom's answer to this application for relief in the Federal Court was a motion to punish Petitioner and your deponent for contempt of court. This application was of course, denied.

The application for relief in the Federal Court came on before U. S. District Judge McGohey. On the pleadings merely, and without a hearing on the merits, Mr. Cullom moved to dismiss the petition because of a pending appeal from the State Court decision to the Appellate Division, First Department. This motion was granted on November 8, 1950 by Judge McGohey, in an opinion in which he stated *inter alia*

> "The petitioner sought and failed to justify the intervention of the state court. He cannot, while pressing his appeal there, relitigate the same issues in this court."

Petitioner appealed to the United States Circuit Court of Appeals from the order of Judge McGohey, and he was met with a motion to dismiss at the Circuit Court of Appeals upon the following three grounds:

1. That the appeal was academic.
2. That the court lacked jurisdiction.
3. That the petitioner was endeavoring to have this court review the decisions of the state court.

Appendix.

The Circuit Court of Appeals dismissed Petitioner's appeal with a single word "Dismissed". It did not state the ground of its decision. Petitioner thereupon moved for a rehearing on January 19, 1951, praying "that this honorable court in the interest of substantial justice and to clarify the record state the ground or basis of its action in dismissing the appeal." This petition for rehearing was likewise denied by the Circuit Court of Appeals with one word "Denied."

The whole purpose of the petition for rehearing was to render the judgment of dismissal final, so that Petitioner might apply to this court for a writ of certiorari to review the action of the Circuit Court of Appeals. But because the dismissal by Judge McGohey and the motion to dismiss at the Circuit Court of Appeals were predicated upon the assertion that Petitioner was endeavoring to review the judgment of the State court, the orders of neither the Circuit Court of Appeals nor of Judge McGohey had such finality as would permit a review by the United States Supreme Court. The Circuit Court of Appeals, however, denied the motion for a rehearing without specifying the ground of decision.

Now it is asserted falsely by the Respondents

> "Precisely the same Federal questions sought to be raised now have all been adjudicated adversely to petitioner in a suit brought by him, during the pendency of the case at bar, in the Federal court; and the decision of that court is *res judicata.*"

A recital of the foregoing facts makes it clear that there has been no adjudication by the Federal Court on the merits. If there had been Petitioner would assuredly have applied for certiorari to this court from the Circuit Court of Appeals. Petitioner has exhausted all remedies before applying to this court for certiorari.

Finally, an attempt is made to have this court dismiss the appeal upon the asserted ground that the failure to raise the Federal questions at the Trial Court, the Appellate Division and the Court of Appeals, constitutes a waiver and an abandonment thereof.

As shown by the foregoing quotation from Mr. Cullom's affidavit, the Federal question was raised at the very outset of this litigation. Respondents do not controvert Petitioner's statement at page 19 of the petition, referring to pertinent portions of the record to support his contention that the lower court rulings were of a nature to bring the case within the statutory provisions that confer jurisdiction upon this court. Instead, by means of the affidavit of a layman (p. 51 of Respondents' Brief) they assert that the Federal questions were nowhere raised at either the Appellate Division or the Court of Appeals. Your deponent denies this assertion. To avoid an extended controversy, your deponent has procured certified copies of the briefs of the various parties at the Appellate Division, of Petitioner's motion papers and briefs at the Court of Appeals and of Respondents' answering brief. Annexed to this affidavit as addenda are pertinent portions of the said briefs and record showing precisely the nature of the Federal questions raised.

In his reply brief to which this affidavit is annexed, Petitioner has amended the Federal questions presented, merely by paraphrasing the summary of Petitioner's argument as made by Respondents' counsel, in his briefs at the Appellate Division and Court of Appeals. As so amended, the question appears at page 19 of the Reply Brief.

It is well nigh impossible in the course of a necessarily short brief and affidavit, to deal with the many inaccurate and misleading statements in Respondents' brief and affidavit in opposition to this petition, most of which statements are irrelevant to the issues. One such point,

however, is of importance sufficient to require answer. It is made as follows under the headnote "Advantages of the Plan to the Common Stock":

> "2. The consolidation not only eliminated the B stock immediately but will ultimately, through the operation of the sinking fund, eliminate the A stock. Upon the basis of the new capitalization, the common stock will then be the only surviving stock with full rights of ownership and voting control." (Respondents' Brief, p. 10.)

This statement is obviously designed to convey the impression that the class of common stockholders represented by Petitioner will eventually acquire "full rights of ownership and control". It artfully conceals the fact that of the *new* common stock to be issued under the consolidation plan to a number of 546,761 shares, the holders of the entire issue of the *old* common stock are accorded 160,000 shares—a mere 29.2% of such new common stock issue! (R. 561).

If in fact the plan was so beneficial to the common stockholders, it is strange indeed that Respondents were so assiduous in choosing the one procedure calculated to deprive the common stockholders of any right to vote upon it.

The reason for this procedure will be found in the fact that Mr. Cullom stated on June 28, 1950, fully two weeks before the organization of Hoe Export Import Corporation,

> "In view of the impossibility of obtaining the consent of two-thirds of the Common stock on a plan of recapitalization which would meet the approval of the A, he suggested that a consolidation with another

corporation, perhaps a wholly-owned subsidiary, be effected, pursuant to Section 86 of the N. Y. Stock Corporation Law."

There is a crying need for review by this court. The Federal question presented is novel. It was not passed upon by the State courts. It is a question of paramount public importance to the community. It involves the integrity of the decrees of the United States District Court in bankruptcy. It is a case which is in common gossip in financial circles. The public interest would best be served by a review by this court. For the reasons stated in the petition, your deponent respectfully prays that the petition for writ of certiorari be granted.

GUSTAVE B. GARFIELD.

Sworn to before me this
1st day of November, 1951.

JEANNETTE OETTINGER
Notary Public, State of New York
No. 24-2944400
Qualified in Kings County
Cert. filed with New York County Clerk's Office
Commission expires March 30, 1953

Appendix.

Letter from Clerk of the Court of Appeals.

STATE OF NEW YORK
COURT OF APPEALS

(Emblem)
Raymond J. Cannon
Clerk

Clerk's Office
Albany 7

October 23, 1951

Gustave B. Garfield, Esq.
Counselor at Law
122 East 42nd Street
New York 17, N. Y.

Re: Katz v. Hoe & Co.

Dear Sir:

We have your inquiry dated October 16th in which you asked for a certificate from this Court to the effect that Federal Questions were raised and passed upon on your motion for leave to appeal in the above entitled case. We know of no procedure in this Court where such a certification has been or can be made on a motion for leave to appeal. Our usual practice in the past has been to provide counsel with certified copies of the motion papers and briefs presented to the Court on the motion.

We are returning your enclosures to you and will be glad to supply you with a certified copy of your Notice of Motion, Affidavit and Brief upon receipt of our fee of $4.50. We have a printed copy now in our possession to which we can attach our certificate if you so desire.

Very truly yours,

RAYMOND J. CANNON
Clerk

Appendix.

Extracts from Certified Copies of Petitioners' Main Brief at the Appellate Division Showing Federal Questions.

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & Co., INC., similarly situated,

Plaintiff-Appellant,

against

R. HOE & Co., INC., *et al.*,

Defendants-Respondents.

BRIEF OF PLAINTIFF-APPELLANT

* * *

POINT III

The real purpose for the organization of Hoe Export-Import Corporation was to use it as a fraudulent device to deprive the common stockholders of Hoe of their right to take over the ultimate control of Hoe from the "A" stockholders, under the provisions of the plan of readjustment in bankruptcy, without affording the common stockholders the right to vote thereon. The Federal Court's decrees being judgments *in rem*, are *res judicata* and are binding on all Courts, parties and their privies.

On *March 1st, 1935,* a decree was entered in the United States District Court for the Southern District of New York in proceedings captioned, "*In the Matter of R. Hoe*

& Co., Inc., Debtor," File No. 60162, pursuant to Section 77-B of the United States Bankruptcy Act, approving, as filed, a plan of readjustment of the said defendant, R. Hoe & Co., Inc., which was just emerging from insolvency (1288-1302) (Plaintiff's Exhibit 1).

On *April 26th, 1935,* a decree was entered in the United States District Court for the Southern District of New York, declaring the plan of readjustment effective and binding on all creditors and stockholders, it appearing that two-thirds of each class of creditors and stockholders had assented thereto in writing (Plaintiff's Exhibit 2) (1303-23).

On *May 15th, 1935,* a decree was entered in the United States District Court for the Southern District of New York, approving a proposed amendment to the certificate of incorporation of the debtor, R. Hoe & Co., Inc., which conformed to the provisions of the decree and the plan dated March 1st, 1935 (1387-98) (Plaintiff's Exhibit 4).

On *June 25th, 1935,* the United States District Court signed its decree discharging the debtor, R. Hoe & Co., Inc., from all of its debts and obligations or rights of its stockholders except such as were reserved in the plan of readjustment dated March 1st, 1935 (Plaintiff's Exhibit 3) (1330-1398).

The provisions of the plan of readjustment of the debtor, R. Hoe & Co., Inc., as they affect the rights of the parties to this litigation and establish their vested property rights are contained in Article IV, Section 1, page 23, under the sub-heading "Miscellaneous."

We shall endeavor to fairly summarize the provisions of this article as follows:

1. The certificate of incorporation shall be amended so as to provide that the board of directors of the com-

pany shall consist of eleven members. (Previously it had been ten.)

2. Prior preferred stock and preferred stock had been issued under the plan to take care of the rights of certain creditors. It was provided that during such periods of time that the prior preferred stock shall have the right voting cumulatively, to elect and continue in office six members out of the eleven members of the board of directors, the Class A stock, voting cumulatively as a class, shall be entitled to elect and continue in office the other five members of the board of directors. (Obviously, during this period of time, the common stockholders were to have no right to elect any directors.)

3. Upon the termination of the right of the prior preferred stock to elect and continue in office six members of the board of directors (which for our purposes we may assume to be the date of the retirement and payment of the said stock of all preferred stock prior to the Class A stock) and continuing until all accumulated and unpaid dividends are paid on the Class A stock in full through the last quarterly dividend period, the holders of the Class A stock, voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the board of directors, and the holders of the common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the board of directors.

4. After all accumulated and unpaid dividends have been paid on the Class A stock, the common stock shall elect six members out of the eleven members of the board of directors and the Class A stock, five mem-

bers. The right so to elect a majority of the board of directors is referred back to the cumulative voting rights in the original certificate of incorporation, paragraph "Thirteenth" thereof, and is specifically stated to be a cumulative voting right.

5. The voting rights with respect to all matters shall be vested at all times exclusively in the Class A stock, other than the election of directors, except that the common stock shall be entitled to vote with respect to a voluntary dissolution; *provided however*

(a) After all accumulated and unpaid dividends on the Class A stock are paid through the last quarterly dividend period and thereafter, so long as the company is not in default in four or more quarterly dividends on the Class A stock (consecutive or not) the common stock, voting as a class, shall have equal rights with the Class A stock, voting as a class, on all matters other than the election of directors.

(b) The exclusive voting rights vested in Class A stock, other than the election of directors, is also subject to the *further proviso* that except with the consent of the majority of the common stock, no amendment of the certificate of incorporation shall be made which shall impair the right of the common stock, voting as a class, to elect and continue in the office two members of the board as such board shall be constituted from time to time, or which shall impair the class voting rights of the common stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence.

Under the plan of readjustment, upon the retirement and payment of the preferred stock the common stockholders

voting cumulatively as a class became entitled to elect and continue in office two members of the board of directors; further it was provided that except with the consent of the common stockholders, no amendment of the certificate of incorporation shall be made which shall impair the right of the common stock, voting cumulatively as a class, to elect two members of the board or which shall impair the class voting rights of the common stock on matters other than the election of directors.

THE RETIREMENT OF THE PREFERRED STOCK

The retirement of the preferred stock was accomplished on September 30, 1946. This appears from the annual report of the defendant (Exhibit O) in which the president of the defendant, Joseph L. Auer, stated:

> "For the first time since R. Hoe & Co., Inc., became a publicly-owned enterprise in 1924, the company is entirely free of long-term debt and has no bonds, *preferred stock* or bank loans outstanding. * * *
>
> "*Thus, the Class A stock has become the senior security of the company,* with operating expenses and current obligations alone having prior claims against assets and income. * * *
>
> "*Of equal significance, with the complete elimination of all debt and preferred stock* was the attainment of the highest level in many years of the book value of the Class A stock, * * *."

Therefore, since September 30, 1946, the common stock under the plan of readjustment, voting cumulatively as a class, has been, and still is, entitled to elect and continue in office two members of the board of directors and to vote upon the amendment to the certificate of incorporation as

proposed in the consolidation certificate. The common stockholders complain that they have been deprived of cumulative voting rights and of the right ultimately to take over the control of Hoe from the A stockholders when the B stock shall have been redeemed.

The Trial Court entered an order, duly appealed from, which denied the plaintiff's motion for a new trial upon rulings of law applicable to the federal decrees as follows:

(a) The Trial Court has failed to take cognizance of the Plan of Readjustment of the United States District Court 77B proceedings and the orders of the said Court dated March 1st, 1935, April 26, 1935, and June 25, 1935, which provide that the common stockholders shall elect two directors voting cumulatively; shall have equal voting rights with the A stockholders on all matters other than the election of directors; and that the certicate of incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class (147).

(b) The controlling decision of the Supreme Court of the United States, *Stoll* v. *Gottlieb,* reported in 305 U. S. 675, reversing *Gottlieb* v. *Crowe,* 368 Ill. 88, which case as decided by the said Supreme Court of the United States, holds that the courts of the several states must give effect as *res adjudicata* to the terms and provisions of a plan of readjustment under a proceeding in 77B, and that said plan is not subject to collateral attack and that by the Court's decision it collaterally attacks and voids as if it never existed, the plan of readjustment contained in the order of March 1, 1935 (148).

In *Stoll* v. *Gottlieb*, *supra*, the Supreme Court of the United States said as follows:

> "This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of *res judicata* arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts. As the contention is that the ruling below disregarded decrees of a court of the United States it raised a federal question reviewable under Section 237 (b) of the Judicial Code, 28 U. S. C. A., Section 344 (b).
>
> "The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form. This statute is broader than the authority granted by Article Four, Section One, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court or modified or set aside in the court of its rendition. As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as *res judicata* is to be given the federal order, if it is concluded it was an effective

judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of *res judicata.* In this particular case, a federal question was involved. This was the power of the federal courts to protect those who came before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power."

In the instant case the respective classes of stockholders of the debtor, R. Hoe & Co., Inc., the common stockholders as a class and the A stockholders as a class, relying upon rights given them through the bankruptcy statute enacted pursuant to constitutional grants of power, agreed among themselves as to their respective rights in the future to amend the charter of the debtor and to ultimately take over control of Hoe. This, it has been held, is a judgment *in rem* binding upon the debtor corporation and upon all of its stockholders past, present and future.

The Supreme Court of the United States said, in the case of *Gratiot County State Bank* v. *Johnson,* 249 U. S. 248, citing with approval the case of *Durant* v. *Abendroth,* 97 N. Y. 140, which will be quoted later, as folows:

"The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon the world * * *. So far as it declares the status of the debtor even strangers to the decree may not attack it collaterally * * *. But an adjudication in bankruptcy like other judgments *in rem* is not *res adjudicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto."

In the case of *Durant* v. *Abendroth*, 97 N. Y. 140, the Court of Appeals of the State of New York, said as follows:

> "So far as the estate of the petitioning bankrupt is concerned, the proceeding is in the nature of a proceeding *in rem* and when the *res* is brought before the Court its adjudication is binding upon the interests of every person whomsoever in that *res*. All persons interested therein must follow it and assert their rights, or be debarred. * * * The general rule as to proceedings *in rem* is that when the property is within the jurisdiction of the Court pronouncing judgment, whether domestic or foreign tribunal, whatever the Court settles as to the right or title or whatever disposition it makes of the property is valid in every country."

In 50 Corpus Juris Secundum, the rule is summed up as follows, at page 554:

> "It has frequently been held that decrees *in rem* are conclusive evidence against all the world of the facts on which they were based, as well as on the status or title of the *res*, and that it will operate as an estoppel in a subsequent action, in respect of the points or questions adjudicated."

In the case of *Horn* v. *Bennett*, 253 App. Div. 630, the Appellate Division, Second Department, said:

> "The appellant's rights as a stockholder were in subordination to those of the corporation, and a judgment against the corporation is competent to establish plaintiff's status (*Stephens* v. *Fox*, 83 N. Y. 313: 1 Freeman on Judgments [5th ed.], Sec. 514). A judgment against the corporation, unless impeached, is conclusive against the corporation and its stockholders

(*Denike* v. *N. Y. & R. Lime, etc., Co.*, 80 N. Y. 599; *Alexander* v. *Donohoe*, 143 *id.* 203; *Marin* v. *Augendahl*, 247 U. S. 142, 150; *Selig* v. *Hamilton*, 234 *id.* 652; *Royal Arcanum* v. *Green*, 237 *id.* 531; *Levy* v. *Equitable Trust Co.*, 271 Fed. 49)."

It has been held that in the absence of a reservation in the final decree in 77B proceedings, of a power to change or modify a plan previously confirmed and consummated, that not even the Court making the order has jurisdiction to modify it or the plan approved thereunder. See *In rem Tom Moore Distillery Co.*, 52 Fed. Supp. 938; *Re Argyle Lake Shore Corp.*, 98 Fed. 2d 372; *Re Corona Radio & Television Corp.*, 102 Fed. 2d 959 (7th Ill. C. C. A.); *Re Flatbush-Nevins Street Corp.*, 133 Fed. 2d 760 (2nd N. Y. C. C. A.).

Even where the Court has receved jurisdiction with respect to matters which might arise in the consummation of the plan where as here the decree fixed the rights of the parties now before this Court, it was held that the Court which originally made the order in the 77B proceeding did not have jurisdiction thereafter to modify the rights of the parties or to amend the plan so as to change rights which were vested thereunder. Thus in the case of *Re Diversey Bldg. Corp.*, 141 F. 2d 65, 55 A.B.R. (N.S.) 716 (144; C.C.A., 7th Ill.), Sparks, Circuit Judge, said:

"We cannot accept appellant's interpretation of subsection (f) of this Act. We are convinced that Congress did not intend that a debtor-corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the Court and was being executed under the Court's supervision. It is quite true that the quoted language from subsection (f) states that changes and modifications may

be proposed before or after a plan is confirmed; however, this sub-section must be construed with other pertinent sub-sections, such as (g) and (h), in determining the intention of Congress. *Here the plan as confirmed had been in operation for almost eight years, without complaint so far as this record shows, and it was originally proposed by the debtor itself. Under these circumstances we think the Court was without jurisdiction to entertain appellant's motion. We interpret sub-section (f) to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the Court.*

"In support of its contention, appellant relies on *In re H. W. Clark Co.* (C.C.A. 7th Cir.), 79 F. 2d 681; *Downtown Invest. Asso.* v. *Boston Metropolitan Bldgs.* (C.C.A. 1st Cir.), 81 F. 2d 314, 30 A.B.R. (N.S.) 483; and *In re Celotex Co.* (D.C.), 12 F. Supp. 1. These cases relate to amendments of the plan of reorganization before its consummation, and for that reason we think they are not in point. We find no authority supporting appellant's interpretation of sub-section (f). Carried to its ultimate conclusion we think it would end in confusion worse confounded both for the creditor and the debtor.

"Appellant urges that the decree of June 28th, 1935, was not a final decree in that the case was not finally disposed of. That decree, however, was interlocutory in its character, and definitely fixed all the rights of the parties, and it was a final and appealable decree. True, the terms of the trust indenture were not fully

performed, and, indeed, full performance could not be required until 1950. However, *the property rights were fixed,* there was no failure of performance on the part of the debtor and its guarantor, and there was no indication that there would be such failure until the principal of the debt was due. Under these circumstances we think that neither the debtor nor the Court could alter those property rights as fixed by the interlocutory decree."

"The district court did not indicate the basis for its ruling. However, we think it was without jurisdiction to grant the relief prayed for."

Perhaps the most recent and the most enlightening case on the subject now under consideration by this Court, is the case of *In re Pittsburgh Terminal Coal Corp.*, appearing in the Federal Advance Sheets of September 25th, 1950, and cited therein as 183 F. 2d 520 (C.C.A. 3d Cir. Pa.), certiorari denied, December 11, 1950, #351, Vol. 95, Law Ed. 179. In that case the Circuit Court of Appeals unanimously affirmed an order of the District Court which granted an application for a preliminary injunction against the holding of a special meeting of stockholders of the debtor corporation called for December 12th, 1949. The purpose of this meeting was to extend the debtor's period of existence and to increase the salary limit of its officers and directors which by its by-laws, written under the plan of reorganization approved by the District Court, limited it to an existence of five years which could be extended for an additional five years, and provided for a limitation on salaries of officers of not to exceed $5,000 per year.

Judge McLaughlin, writing for the unanimous Court, said:

"On December 9th, 1949, after hearing the matter, the District Court preliminarily enjoined the meeting

and ordered the Trustee to investigate appellant for the purpose of determining whether it had been conducted in accordance with the Coal Company plan of reorganization. This appeal is from that order.

"Appellant contends that the District Court had no jurisdiction over it; that the Trustee had no right or duty to supervise its affairs; that the proposed amendments to its by-laws are lawful, and that Court approval is not necessary to their adoption by the stockholders.

"* * * The appellant successor corporation was created in order to liquidate the remaining assets of the debtor. To prevent undue prolongation of the liquidation process and excessive expense in that connection, appellant was given the limited existence of five years, with a possible extension of five more years after that, and a salary ceiling of $5,000.00 a year for all corporate officers and directors. Those provisions were inserted in the by-laws. Appellant's theory is that the increasing of the duration of the corporate existence and the removal of the salary restriction merely means a technical change in the by-laws and that it is entirely a matter of intra-corporate policy having nothing to do with the reorganization plan and its rightful functioning.

"The situation is not as simple as that. The charge is directly made that the person controlling the appellant is endeavoring to defeat an important element of the plan. * * *

"The investigation was authorized and directed 'for the purpose of determining whether or not said corporation has been conducted in accordance with the terms, provisions, intent and purpose of the plan of reorganization of Pittsburgh Terminal Coal Corp.,

debtor.' Report of the investigation is to be made to the Bankruptcy Court. * * *

"The charges concern an important phase of the plan which is still in the process of being carried out. It was part of the plan to accomplish its purpose that appellant was created. If appellant now seeks by the proposed change in its by-laws to violate the letter and the spirit of the plan, the facts should be examined, and while they are being examined appellant should be prevented from doing the very acts which are protested. * * * The charges that appellant is deliberately attempting to evade the plan are serious and substantial."

Summarizing the foregoing orders of the U. S. District Court for the Southern District of New York, and the law applicable thereto in the enforcement of those orders, we arrive at the following conclusion: The debtor-corporation, R. Hoe & Co., Inc., in order to be discharged from the 77B proceeding, had to have the consent of two-thirds in number and amount of its creditors and each class of its stockholders affected by the plan of reorganization. By the plan of reorganization finally approved, control of the corporation passed to the Class A stockholders, they having the right to elect nine out of the eleven directors while the common stockholders had the right to elect two directors. This situation was augmented by an additional provision which gave the common stockholders the right to vote only on the proposition of dissolution and not to vote upon the proposition of consolidation; but such limitations on the rights of the common stockholders to vote were provisional and the provision is incorporated in the plan of reorganization as follows:

"provided, however, that after all accumulated and unpaid dividends on the Class 'A' stock are paid in

full through the last quarterly dividend period and thereafter so long as the Company is not in default in four or more quarterly dividends on the Class 'A' stock (whether consecutive or not), the Common Stock, voting as a class, shall have equal rights with the Class A stock, voting as a class, on all matters other than the election of directors; and provided, further, that except with the consent of a majority of the Common Stock, no amendment of the certificate of incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the class voting rights of the Common Stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence."

The A directors being representatives of the Federal Court were fiduciaries in respect to the common stockholders. Though the common stockholders were the owners of Hoe, the Bankruptcy Court placed the A stockholders in temporary control as its representative, to protect their investment. The temporary control was given to the A stockholders not as owners but as trustees. Their tenure was specifically defined and was to end as soon as their arrearages were paid. That was clearly the intent of the bankruptcy reorganization and was followed for many years.

The present group of A directors took office pursuant to that reorganization plan and as trustees for the Bankruptcy Court in 1946 when the preferred stock was eliminated. Their trusteeship was similar to a spendthrift trust in which the beneficiary (the common stockholders) is protected until he reaches a sound financial position

(arrearages paid off). In establishing this trust and depriving the common stockholders of many of their rights of ownership during its existence the Bankruptcy Court did not grant power to the trustees to extend its duration —at least not without the consent of the common stockholders. Nevertheless, that is exactly what the A stockholders have accomplished here. Not only have they extended the duration of the trust but they appropriated much of the beneficiary's interest therein.

Ordinarily, trustees who appropriate the beneficiary's interest for their own use are guilty of despicable crimes. The A stockholders and directors as trustees have done the same thing here, but because they have covered their criminal act with a cheesecloth (the consolidation) the Trial Court not only did not consider it a crime but held it to be perfectly legal.

This Court should not permit itself to be blinded from the true facts and should recognize the gross breach of fiduciary duty of the A directors.

Since the decrees in the Bankruptcy Court are *res judicata* in the State Court, the provisions thereof are in full force and effect, assuring the common stockholders the right to vote cumulatively as a class upon all matters other than the election of directors as well as upon the amendment of the certificate of incorporation.

The plaintiff was entitled to a judgment on behalf of the common stockholders declaring that the action of the class A directors and stockholders violated a vested property right of the common stockholders contained in the decrees of the United States District Court; that the decrees of the District Court upon the basis of which the debtor, R. Hoe & Co., Inc., was discharged from bankruptcy are binding upon the debtor and the respective classes of stockholders and their privies. Plaintiff's pro-

posed findings of fact (94-107) should be signed by this Court and declaratory judgment should enter, holding that the action of the directors and the A stockholders in effecting the consolidation was null and void as matter of law.

* * *

In the instant case, the common stockholders' right to vote is completely destroyed by the fictitious consolidation. The right to vote is an essential attribute of the common stockholders' property, and the deprivation thereof without compensation is illegal.

> *Lord* v. *Equitable Life Assur. Society,* 194 N. Y. 212.

There is a tremendous difference between a right to vote and a right to dividends. The former is the only means that the stockholder has to supervise and control his property.

> *Lord* v. *Equitable Life Assur. Society, supra.*

Dividends, on the other hand, are entirely within the discretion of the Board of Directors and stockholders have no vested rights thereto until actually declared.

The elimination of arrearages in dividends on preferred stock was also involved in the *Hottenstein* and *Zobel* cases, *supra.* In the former, the Federal Court held that it was bound to follow the Delaware law as determined by the Delaware Court in the *Havender* case, *supra.* In the latter, the Court relied almost entirely upon the decisions in *Havender* and *Hottenstein, supra.*

In none of the cases cited by the defendants did the consolidation circumvent any other provision of the law, as here; in none did the Court sanction the disfranchisement of a class of stockholders by resort to subterfuge.

CONCLUSION.

The judgment and order appealed from should be reversed, plaintiff's proposed findings signed, and judgment entered in favor of the plaintiff and defendant-appellant, Martin, *for the relief demanded in the complaint* and cross complaint with costs and disbursements to the appellants. The certificate of consolidation should be declared a nullity and the Secretary of State directed to strike the certificate of consolidation from his records. The shares of stock issued pursuant to the plan of consolidation should be declared null and void and the common stockholders, as they existed prior to the consolidation, should be reinvested with all of the rights given to them under the plan of readjustment and under the certificate of incorporation as amended prior to consolidation.

Respectfully submitted,

GUSTAVE B. GARFIELD,
Attorney for Plaintiff-Appellant.

Appendix.

Extract from Certified Copies of the Respondents' Brief at the Appellate Division (p. 62 thereof) Showing Its Summary of Federal Question.

"POINT VI

"THERE HAS BEEN NO VIOLATION OF THE FEDERAL COURT ORDERS.

In his brief (p. 20), Katz argues that this consolidation violates the plan of reorganization approved by the Federal Court in the Hoe 77B proceeding of 1935—or, to state it differently, that the certificate of incorporation, as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means. To state the claim is to answer it.

The Trial Court dismissed the contentions as unsound; and it is worthy of note that Katz's colleague, Martin, does not say one word in support thereof. * * *"

Appendix.

Extracts from Certified Copies of Petitioner's Reply Brief Showing Federal Questions Raised.

NEW YORK SUPREME COURT

APPELLATE DIVISION—FIRST DEPARTMENT

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & CO., INC., similarly situated,

Plaintiff-Appellant,

against

R. HOE & CO., INC., *et al.*,

Defendants-Respondents.

REPLY BRIEF OF PLAINTIFF-APPELLANT

The issues presented by this appeal are of far reaching importance to the financial community at large. They are invested with a public interest which affects investors small and large throughout the entire length and breadth of the land. Our metropolis is the financial center of the world and what we do and say here is listened to and watched by every financial paper and advisor everywhere. These people want to know whether Cullon can get away with it. These people are clamoring to find out whether a group of directors domiciled in the Bronx, can, by means of a paper device of a corporate fiction, set at nought the sovereign will of the People of the State of New York, and the solemn decree of the United States District Court discharging the debtor R. Hoe & Co. from insolvency.

The Supreme Court of the United States in the case of *Stoll* v. *Gottlieb,* 305 U. S. 675, has held that a decree of the bankruptcy court, discharging an insolvent from

77B proceedings, must be respected by state courts as *res judicata,* as to the legislative aspects of the plan of readjustment. Defendant Cullon has invented a new law. He is not bound by the Supreme Court of the United States. He is the law unto himself. He says that the decision rendered by Judge McGohey dismissing plaintiff's appeal to that court for lack of jurisdiction of the Federal Court is *res judicata* in this court. That's a new wrinkle in the annals of legal legerdemain, *i. e.,* to ignore the original decree of a court as *res judicata* and to plead as an adjudication that court's refusal to take jurisdiction because prior action was commenced in a state court.

Defendants-respondents assert that there has been no violation of the Federal Court orders (Point VI). But in making this point they utterly disregard the decision of the Supreme Court of the United States in *Stoll* v. *Gottlieb, supra,* and the implication of that decision. Instead they content themselves by quoting a fragment from the decision of the Circuit Court of Appeals for the Second Circuit *In re Ambassador Hotel Corp.,* 2 Cir., 124 F. 2nd 435, 437. It is noteworthy that the Circuit Court has, on February 1, 1951, repudiated limited and explained the scope of its decision in the *Ambassador* case. See N. Y. Law Journal (front page) March 5, 1951, *Prudence Bonds Corp.* v. *City Bank Farmers Trust Co.,* where L. Hand, C. J., writing for the unanimous bench said:

"• • • there has undoubtedly been considerable difference of opinion about the court's power to accommodate the original 'plan' to changes after confirmation in the financial situation of the 'revived debtor.' On this question we declared ourselves four times between 1942 and 1946. In In re Ambassador Hotel Corporation (124 Fed., 2d, 435) the State of New York had passed the 'Streit Law' affecting voting trusts after a 'plan' had been confirmed which set up

a voting trust, whose duration, though lawful at the time, it was alleged that that act had cut down. We held that the state courts alone had jurisdiction to decide whether it had done so, and we did not mention the circumstance that the order of confirmation contained no reservation of powers, so far as appears. * * *

* * * We therefore conclude that our earlier decisions, in so far as they depended upon the presence of an express reservation in either the 'plan' or the order of confirmation, were erroneous.

The question is one of discretion, though of a discretion which should be sparingly exercised, and which should not be exercised, as in North American Car Corporation v. Peerless Machine Corporation (143 Fed., 2d, 938, C. A. 3), unless the circumstances peremptorily demand it. That they did in Knight v. Wertheim & Co., 158 Fed. (2), 838, for otherwise the bondholders would have gone off with a large equity, owing to the wholly unexpected appreciation of the property, a result which the whole history of foreclosure forbade. We cannot deny that the view which we now take may lead to abuse; it is often exceedingly difficult for a bankruptcy court to resist the importunities, usually unopposed, of those who wish to keep the 'revived debtor' indefinitely beneath its aegis, and our review of a discretion which we may think to have been unwisely exercised is not a very effective remedy. We can do no more than declare, for whatever weight it may have, that we deem the long delay which so often occurs between the order of 'confirmation' and the 'final order' a major abuse, and that a judge who superintends such a proceeding should feel himself charged with an affirmative duty to insist upon its early conclusion."

It is therefore clear that the decision of the Circuit Court for the Second Circuit in dismissing the appeal of appellant Katz, without the record before it, merely refused as a matter of discretion to take jurisdiction. Since plaintiff prayed only for an injunction in that court and not as here for a declaratory judgment the court may have dismissed the case for mootness, but refused to express itself. Here this court is asked to declare the illegal acts done by defendants-respondents to be such even though the meeting of A stockholders may already have been held. Survival of the dispute is clear in this court and the question is not moot.

* * *

When the defendant R. Hoe & Co., Inc., was an insolvent, in 1935, represented by an eminent firm of attorneys (Simpson, Thatcher and Bartlett), it came, hat in hand, into the United States District Court for the Southern District of New York, pleading for release from the economic drought which engulfed it. It made a compact with its common stockholders, past, present and future, that at a time to come, when its obligations to its creditors and "A" stockholders had been fulfilled, the common stockholders, would come into their own and taken over control. This compact is contained in the miscellaneous provision of the plan of readjustment, dated March 1, 1935, which has been quoted in our main brief and in the complaint.

In the intervening 15 years since the defendant R. Hoe & Co., Inc., has been discharged from bankruptcy, many investors have paid their hard earned money for its common stock.

The common stockholders of Hoe had a right to rely upon the court decrees and the charter provisions which gave them the right to vote on all matters, including the amendment of its Certificate of Incorporation on an equality with the "A" stockholders.

* * *

Appendix.

Extract from Certified Copies of Petitioner's Notice of Motion for Leave to Appeal to the Court of Appeals Showing Federal Questions.

COURT OF APPEALS OF THE STATE OF NEW YORK

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & Co., INC., similarly situated,

Plaintiff-Appellant,

against

R. HOE & Co., INC., *et al.*,

Defendants-Respondents.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of GUSTAVE B. GARFIELD, sworn to May 15, 1951, upon the notice of motion and brief of the defendant-appellant Martin for leave to appeal to the Court of Appeals, intended to be served and heard simultaneously herewith, and upon the annexed plaintiff-appellant's brief, the undersigned will move this court at a term thereof to be held at the Court of Appeals, Albany, New York, at the first term for the hearing of motions after the service and filing of the within papers, for an order granting leave to the plaintiff-appellant to appeal to the Court of Appeals from a judgment of the Supreme Court, New York County, made and entered in the office of the Clerk of the County of New York on April 27, 1951, which adjudges that the judgment in favor of the defendants except Martin dismissing the complaint and cross-complaint and the order

denying plaintiff's motion for a new trial be in all things affirmed, and plaintiff will also move for leave to appeal from the order of the Appellate Division, First Department, dated the 25th day of April, 1951, as unanimously affirms the judgment appealed from, on the following grounds:

* * *

4. The real purpose for the organization of Hoe Export-Import Corporation was to use it as a fraudulent device to deprive the common stockholders of Hoe of their right to take over the ultimate control of Hoe from the "A" stockholders, under the provisions of the plan of readjustment in bankruptcy, without affording the common stockholders the right to vote thereon. The Federal Court's decrees, being judgments *in rem*, are *res judicata* and are binding on all Courts, parties and their privies.

5. This Court should pierce the corporate veil of "the recently formed" dummy, Hoe Export-Import Corporation, disregard its form as a subsidiary, and regard it in substance as an instrument or device conceived and created, by the Class A directors of R. Hoe & Co., Inc., for the sole purpose of the evasion of the law which gives the common stockholders the right to vote upon the proposed reorganization.

Yours, etc.,

GUSTAVE B. GARFIELD,
Attorney for Plaintiff-Appellant,
Nathan Katz,
Office and Post Office Address,
122 East 42nd Street,
New York City, N. Y.

To:

NEIL P. CULLOM, Esq.,
Attorney for Defendants-Respondents,
Office and Post Office Address,
63 Wall Street,
New York City, N. Y.

BOOTH & BARON, Esqs.,
Attorneys for Defendant-Appellant, Martin,
20 Broad Street,
New York City, N. Y.

THE CLERK OF THE COURT OF APPEALS.

Affidavit of Gustave B. Garfield.

COURT OF APPEALS OF THE STATE OF NEW YORK.

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. HOE & Co., INC., similarly situated,

Plaintiff-Appellant,

against

R. HOE & Co., INC., *et al.*,

Defendants-Respondents.

City, County and State of New York, ss:

GUSTAVE B. GARFIELD, being duly sworn, deposes and says:

I am the attorney for the plaintiff-appellant herein.

* * *

It is the appellant's contention that the muddled financial situation of the defendant, R. Hoe & Co., Inc., and those who purchased the new shares of stock issued after the consolidation, was brought about by the failure of the Appellate Division to grant a stay pending an appeal.

The case was tried upon the theory that if a single common stockholder had a just cause of action and a right to vote, his right is enforceable notwithstanding the demand of the A stockholders or the wishes of the remaining common stockholders. It is submitted that the Appellate Division could not change the theory upon which the case was tried and affirm as a matter of convenience. If a wrong was done to one it was done to all stockholders in that class.

Appellant submits that it is a greater injustice to permit a consolidation, effected contrary to the edict of the legislature and the solemn decree of the bankruptcy court than it is to upset it because the transaction is fully consummated. Those who purchased shares after consolidation purchased it subject to pending litigation and an appeal of which the whole world had notice.

The basic question raised by this appeal is one of law. The basic facts were not disputed upon the trial nor can they be disputed upon this appeal. It is only the legal interpretation which one places upon conceded facts which is in controversy.

It is respectfully submitted that a question of paramount and substantial public interest is presented, which should be decided by this Court.

Plaintiff urges that a common stockholder is not compelled to accept appraisal in a larcenous consolidation and that appraisal is not the exclusive remedy of a common stockholder who seeks to protect his vested right in com-

mon with all other stockholders to take over the control of a corporation from its temporary trustees, the A stockholders.

There is more involved in this case than money. The integrity of the bankruptcy court and of the State of New York, which has issued these shares of stock pursuant to a bankruptcy decree and under a New York charter, is involved. The legislative mandate that every common stockholder is entitled to vote on a proposed change of corporate charter affecting stockholdings has been thwarted by a cheap device. Stockholders throughout the land await the decision of this Court on this important matter. It is respectfully submitted that the case should be fully aired in this court and for that reason it is respectfully prayed that the plaintiff's motion for leave to appeal be granted.

* * *

GUSTAVE B. GARFIELD.

Sworn to before me this
15th day of May, 1951.

JEANNETTE GETTINGER,
Notary Public, State of New York.

Appendix.

Extracts from Brief of Plaintiff-Appellant Nathan Katz in Support of Motion for Leave to Appeal to the Court of Appeals Showing Federal Questions.

COURT OF APPEALS OF THE STATE OF NEW YORK

NATHAN KATZ, individually and suing on behalf of himself and all other common stockholders of R. Hoe & Co., Inc., similarly situated,

Plaintiff-Appellant,

against

R. HOE & CO., INC., JOSEPH L. AUER, HARRY K. BARR, VANDIVER BROWN, WILLIAM L. CANADY, NEIL P. CULLOM, HAROLD W. DANSER, EDWARD FOSTER, JOHN KADEL, EDWIN L. MUNZERT, HAROLD M. TILLINGHAST, DANIEL BEISINGER, WILLIAM F. BYRNE, ARTHUR DRESSEL, CHARLES A. HARLESS, JOHN R. KINGAN, CHARLES E. LITTLETON, W. J. V. MURPHY,

Defendants-Respondents,

and

ALFRED D. MARTIN,

Defendant-Appellant.

Statement.

The plaintiff-appellant Nathan Katz moves for leave to appeal to this court after unanimous affirmance by the Appellate Division, First Department, of his appeal to that court. Suing individually and on behalf of all other common stockholders of R. Hoe & Co., Inc., plaintiff ap-

pealed from a judgment made and entered in the office of the Clerk of the Supreme Court, New York County, dated October 31, 1950, after trial before Honorable Denis O'Leary Cohalan, dismissing on the merits the plaintiff's complaint and the cross complaint of the defendant, Alfred D. Martin, in an action seeking a declaratory judgment. Plaintiff also appealed from an order entered on or about November 3, 1950, denying plaintiff's motion for a new trial (14-18, 145-152).*

The Second Amended Complaint.

At the time of the trial, the defendant, R. Hoe & Co., Inc., a domestic corporation, was capitalized as follows (26):

Title of Shares	Par Value	Shares Authorized	Outstanding
Class A	$10.00 per share	100,000	95,997
Class B	.10 " "	194,767	194,767
Common Stock	1.00 " "	160,000	160,000

Plaintiff is the owner of 500 shares of the common capital stock of the corporation; defendant, R. Hoe & Co., Inc., having acquired his shares December 23, 1949 (35).

The defendant, R. Hoe & Co., Inc., was reorganized under § 77-B of the Bankruptcy Act in the United States District Court for the Southern District of New York, pursuant to a plan of readjustment, dated March 1, 1935, two-thirds of all classes of stock consenting thereto on

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* Figures in parentheses throughout this brief are to folio references of the record.

April 26, 1935. Thereupon, the debtor was discharged and its property returned to it (27-31).

The plan of readjustment which survived the debtor's discharge in bankruptcy provided prospectively for the voting rights of the A stockholders and common stockholders as follows:

> "The voting rights with respect to all matters other than the election of directors, shall at all times be vested exclusively in the holders of Class 'A' stock, except as in Article III thereof specified as to the prior Preferred Stock and the Preferred Stock, and except that the Common Stock, voting as a class, shall be entitled to vote only with respect to a voluntary dissolution of the company pursuant to Section 105 of the Stock Corporation Law of New York; *provided,* however, that after all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period and thereafter so long as the company is not in default in four or more quarterly dividends on the Class 'A' stock (whether consecutive or not) the Common Stock, voting as a class, shall have equal rights with the Class 'A' Stock, voting as a class on all matters other than the election of directors, and *provided further* that, except with the consent of a majority of the Common Stock, no amendment to the Certificate of Incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the class voting rights of the Common Stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence" (28-30).

Appendix.

A plan of consolidation and recapitalization was put into effect on February 28, 1947, by which all dividend arrears on the Class A stock were eliminated by the issuance to the Class A stock of four shares of non-voting Class B stock, plus $3 in cash for each share of Class A stock held (33).

The Class A stockholders have received and accepted in full payment of all accumulated and unpaid dividends in arrears the four shares of B stock for each share held by them and dividends have been paid on the Class A stock consecutively since February 28, 1947, to date (34).

In or about the month of June, 1950, the A directors entered into a scheme to recapitalize the defendant, R. Hoe & Co., Inc., without permitting the common stockholder to vote upon said recapitalization, for the purpose of taking ultimate control away from the common stockholder and vesting it permanently in the Class A stockholders (36-38).

Pursuant to the said scheme, the directors representing the A stockholders, on July 11, 1950, caused a dummy corporation called "Hoe Export-Import Corporation" to be organized under the laws of the State of New York, which corporation never transacted business, had no assets or reason for existence other than as instrument to carry out the foregoing conspiracy. That the A directors caused a special meeting of the Class A stockholders to be called to vote upon a consolidation between the defendant R. Hoe & Co., Inc., and its dummy subsidiary, Hoe Export-Import Corporation (38-39).

Plaintiff alleges that to permit the defendants to carry out said reorganization and recapitalization under the guise of the aforesaid fraudulent consolidation without permitting the common stockholders to vote thereon, does consti-

tute deprivation of plaintiff's property without due process and a violation of the laws of the State of New York, of the United States of America and of the decree of the United States District Court for the Southern District of New York, dated March 1, 1935, and April 25, 1935; that plaintiff has no adequate remedy at law (41-44).

Plaintiff demands a declaratory judgment that the said action of the defendants is null and void and of no effect in law (45-46).

The Answer of the Defendant-Appellant, Martin.

The defendant, Alfred D. Martin, a director representing the common stockholders, for his answer, sets forth a crossclaim in which he prays for the same relief sought by the plaintiff (49-86).

The Answer of the Defendants Constituting the A Directors and the Defendant Corporation, R. Hoe & Co., Inc.

Aside from admitting that plaintiff is an owner of 500 shares of the common stock of the defendant, R. Hoe & Co., Inc., which were transferred to his name on December 23, 1949, and the making of various orders by the United States District Court for the Southern District of New York, the said defendants deny each and every allegation in the second amended complaint. They further allege that plaintiff has an adequate remedy at law (88-93).

POINT III

The real purpose for the organization of Hoe Export-Import Corporation was to use it as a fraudulent device to deprive the common stockholders of Hoe of their right to take over the ultimate control of Hoe from the "A" stockholders, under the provisions of the plan of readjustment in bankruptcy, without affording the common stockholders the right to vote thereon. The Federal Court's decrees being judgments *in rem*, are *res judicata* and are binding on all Courts, parties and their privies.

On *March 1st, 1935,* a decree was entered in the United States District Court for the Southern District of New York in proceedings captioned, *"In the Matter of R. Hoe & Co., Inc., Debtor,"* File No. 60162, pursuant to Section 77-B of the United States Bankruptcy Act, approving, as filed, a plan of readjustment of the said defendant, R. Hoe & Co., Inc., which was just emerging from insolvency (1288-1302) (Plaintiff's Exhibit 1).

On *April 26th, 1935,* a decree was entered in the United States District Court for the Southern District of New York, declaring the plan of readjustment effective and binding on all creditors and stockholders, it appearing that two-thirds of each class of creditors and stockholders had assented thereto in writing (Plaintiff's Exhibit 2) (1303-23).

On *May 15th, 1935,* a decree was entered in the United States District Court for the Southern District of New York, approving a proposed amendment to the certificate of incorporation of the debtor, R. Hoe & Co., Inc., which conformed to the provisions of the decree and the plan dated March 1st, 1935 (1387-98) (Plaintiff's Exhibit 4).

On *June 25th, 1935,* the United States District Court signed its decree discharging the debtor, R. Hoe & Co., Inc., from all of its debts and obligations or rights of its stock-

holders except such as were reserved in the plan of readjustment dated March 1st, 1935 (Plaintiff's Exhibit 3) (1330-1398).

The provisions of the plan of readjustment of the debtor, R. Hoe & Co., Inc., as they affect the rights of the parties to this litigation and establish their vested property rights are contained in Article IV, Section 1, page 23, under the sub-heading "Miscellaneous," as follows:

1. The certificate of incorporation shall be amended so as to provide that the board of directors of the company, shall consist of eleven members. (Previously it had been ten.)

2. Prior preferred stock and preferred stock had been issued under the plan to take care of the rights of certain creditors. It was provided that during such periods of time that the prior preferred stock shall have the right voting cumulatively, to elect and continue in office six members out of the eleven members of the board of directors, the Class A stock, voting cumulatively as a class, shall be entitled to elect and continue in office the other five members of the board of directors. (Obviously, during this period of time, the common stockholders were to have no right to elect any directors.)

3. Upon the termination of the right of the prior preferred stock to elect and continue in office six members of the board of directors (which for our purposes we may assume to be the date of the retirement and payment of the said stock of all preferred stock prior to the Class A stock) and continuing until all accumulated and unpaid dividends are paid on the Class A stock in full through the last quarterly dividend period, the holders of the Class A stock,

voting cumulatively as a class, shall be entitled to elect and continue in office nine members of the board of directors, and the holders of the common stock, voting cumulatively as a class, shall be entitled to elect and continue in office two members of the board of directors.

4. After all accumulated and unpaid dividends have been paid on the Class A stock, the common stock shall elect six members out of the eleven members of the board of directors and the Class A stock, five members. The right so to elect a majority of the board of directors is referred back to the cumulative voting rights in the original certificate of incorporation, paragraph "Thirteenth" thereof, and is specifically stated to be a cumulative voting right.

5. The voting rights with respect to all matters shall be vested at all times, exclusively in the Class A stock, other than the election of directors, except that the common stock shall be entitled to vote with respect to a voluntary dissolution; *provided however*

(a) After all accumulated and unpaid dividends on the Class A stock are paid through the last quarterly dividend period and thereafter, so long as the company is not in default in four or more quarterly dividends on the Class A stock (consecutive or not) the common stock, voting as a class, shall have equal rights with the Class A stock, voting as a class, on all matters other than the election of directors.

(b) The exclusive voting rights vested in Class A stock, other than the election of directors, is also subject to the *further proviso* that except with the consent of the majority of the common stock, no amendment of the certificate of incorporation shall

> be made which shall impair the right of the common stock, voting as a class, to elect and continue in office two members of the board as such board shall be constituted from time to time, or which shall impair the class voting rights of the common stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence.

Under the plan of readjustment, upon the retirement and payment of the preferred stock the common stockholders voting cumulatively as a class became entitled to elect and continue in office two members of the board of directors; further it was provided that except with the consent of the common stockholders, no amendment of the certificate of incorporation shall be made which shall impair the right of the common stock, voting cumulatively as a class, to elect two members of the board or which shall impair the class voting rights of the common stock on matters other than the election of directors.

THE RETIREMENT OF THE PREFERRED STOCK.

The retirement of the preferred stock was accomplished on September 30, 1946. This appears from the annual report of the defendant (Exhibit O) in which the president of the defendant, Joseph L. Auer, stated:

> "For the first time since R. Hoe & Co., Inc., became a publicly-owned enterprise in 1924, the company is entirely free of long-term debt and has no bonds, *preferred stock* or bank loans outstanding. * * *
>
> "*Thus, the Class A stock has become the senior security of the company,* with operating expenses and current obligations alone having prior claims against assets and income. * * *

> *"Of equal significance, with the complete elimination of all debt and preferred stock* was the attainment of the highest level in many years of the book value of the Class A stock, * * *."

Therefore, since September 30, 1946, the common stock under the plan of readjustment, voting cumulatively as a class, has been, and still is, entitled to elect and continue in office two members of the board of directors and to vote upon the amendment to the certificate of incorporation as proposed in the consolidation certificate. The common stockholders complain that they have been deprived of cumulative voting right and of the right ultimately to take over the control of Hoe from the A stockholders when the B stock shall have been redeemed.

The Trial Court entered an order, duly appealed from, which denied the plaintiffs' motion for a new trial upon rulings of law applicable to the federal decrees as follows:

(a) The Trial Court has failed to take cognizance of the Plan of Readjustment of the United States District Court 77B proceedings and the orders of the said Court dated March 1st, 1935, April 26, 1935, and June 25, 1935, which provide that the common stockholders shall elect two directors voting cumulatively; shall have equal voting rights with the A stockholders on all matters other than the election of directors; and that the certificate of incorporation of R. Hoe & Co., Inc., debtor, shall not be amended without the consent of the common stockholders voting as a class (147).

(b) The controlling decision of the Supreme Court of the United States, *Stoll* v. *Gottlieb,* reported in 305 U. S. 675, reversing *Gottlieb* v. *Crowe,* 368 Ill. 88,

which case as decided by the said Supreme Court of the United States, holds that the courts of the several states must give effect as *res adjudicata* to the terms and provisions of a plan of readjustment under a proceeding in 77B, and that said plan is not subject to collateral attack and that by the Court's decision it collaterally attacks and voids as if it never existed, the plan of readjustment contained in the order of March 1, 1935 (148).

In *Stoll* v. *Gottlieb, supra,* the Supreme Court of the United States said as follows:

"This certiorari was allowed to review a judgment of the Supreme Court of Illinois. That court had denied effect to a plea of *res judicata* arising from orders of a district court in bankruptcy. Provisions declaring the supremacy of the Constitution and the extent of the judicial power and authorizing necessary and proper legislation to make the grants effective confer jurisdiction upon this Court to determine the effect to be given decrees of a court of the United States in state courts. As the contention is that the ruling below disregarded decrees of a court ot the United States it raised a federal question reviewable under Section 237 (b) of the Judicial Code, 28 U.S.C.A., Section 344 (b).

* * * * * *

"The Congress enacted, as one of the earlier statutes, provisions for giving effect to the judicial proceedings of the courts. This has long had its present form. This statute is broader than the authority granted by Article Four, Section One, of the Constitution to prescribe the manner of proof and the effect of the judicial proceedings of states. Under it the

judgments and decrees of the federal courts in a state are declared to have the same dignity in the courts of that state as those of its own courts in a like case and under similar circumstances. But where the judgment or decree of the federal court determines a right under a federal statute, that decision is 'final until reversed in an appellate court or modified or set aside in the court of its rendition. As this plea was based upon an adjudication under the reorganization provisions of the Bankruptcy Act, effect as *res judicata* is to be given the federal order, if it is concluded it was an effective judgment in the court of its rendition. The problem before the Supreme Court of Illinois was not one of full faith and credit but of *res judicata.* In this particular case, a federal question was involved. This was the power of the federal courts to protect those who came before them relying upon constitutional rights or rights given, as in this case, through a statute enacted pursuant to constitutional grants of power."

In the instant case the respective classes of stockholders of the debtor, R. Hoe & Co., Inc., the common stockholders as a class and the A stockholders as a class, relying upon rights given them through the bankruptcy statute enacted pursuant to constitutional grants of power, agreed among themselves as to their respective rights in the future to amend the charter of the debtor and to ultimately take over control of Hoe. This, it has been held, is a judgment *in rem* binding upon the debtor corporation and upon all of its stockholders past, present and future.

The Supreme Court of the United States said, in the case of *Gratiot County State Bank* v. *Johnson,* 249 U. S. 248:

> "The adjudication is, for the purpose of administering the debtor's property, that is, in its legislative effect, conclusive upon the world * * *. So far as it declares the status of the debtor even strangers to the decree may not attack it collaterally * * *. But an adjudication in bankruptcy like other judgments *in rem* is not *res adjudicata* as to the facts or as to the subsidiary questions of law on which it is based, except as between parties to the proceeding or privies thereto."

In the case of *Durant* v. *Abendroth,* 97 N. Y. 140, the Court of Appeals of the State of New York, said:

> "So far as the estate of the petitioning bankrupt is concerned, the proceeding is in the nature of a proceeding *in rem* and when the *res* is brought before the Court its adjudication is binding upon the interests of every person whomsoever in that *res.* All persons interested therein must follow it and assert their rights, or be debarred. * * * The general rule as to proceedings *in rem* is that when the property is within the jurisdiction of the Court pronouncing judgment, whether domestic or foreign tribunal, whatever the Court settles as to the right or title or whatever disposition it makes of the property is valid in every country."

It has been held that not even the Bankruptcy Court, making the order has jurisdiction to modify it, or the plan approved thereunder. See *In rem Tom Moore Distillery Co.,* 52 Fed. Supp. 938; *Re Argyle Lake Shore Corp.,* 98 Fed. 2d 372; *Re Corona Radio & Television Corp.,* 102 Fed. 2d 959 (7th Ill. C.C.A.).

That the Court which originally made the order in the 77B proceeding did not have jurisdiction thereafter to

modify the rights of the parties or to amend the plan so as to change rights which were vested thereunder, has been held in the case of *Re Diversey Bldg. Corp.*, 141 F. 2d 65, 55 A.B.R. (N.S.) 716 (144; C.C.A., 7th Ill.). Sparks, Circuit Judge, said in the *Diversey* case:

> "We cannot accept appellant's interpretation of sub-section (f) of this Act. We are convinced that Congress did not intend that a debtor-corporation should be permitted to ask for a radical change of plan of reorganization after it had been confirmed by the Court and was being executed under the Court's supervision. It is quite true that the quoted language from sub-section (f) states that changes and modifications may be proposed before or after a plan is confirmed; however, this sub-section must be construed with other pertinent sub-sections, such as (g) and (h), in determining the intention of Congress. *Here the plan as confirmed had been in operation for almost eight years, without complaint so far as this record shows, and it was originally proposed by the debtor itself. Under these circumstances we think the Court was without jurisdiction to entertain appellant's motion. We interpret sub-section (f) to mean that changes and modifications after the plan is confirmed refer to such changes as will better aid in carrying out the plan which has been finally confirmed, and not such changes or modifications as will materially alter the property rights established by the decree of confirmation, and in no event shall any change be made without the consent of the Court.*
>
> "In support of its contention, appellant relies on *In re H. W. Clark Co.* (C.C.A. 7th Cir.), 79 F. 2d 681; *Downtown Invest. Asso.* v. *Boston Metropolitan Bldgs.* (C.C.A. 1st Cir.), 81 F. 2d 314, 30 A.B.R. (N.S.) 483; and *In re Celotex Co.* (D.C.), 12 F. Supp. 1. These

cases relate to amendments of the plan of reorganization before its consummation, and for that reason we think they are not in point. We find no authority supporting appellant's interpretation of sub-section (f). Carried to its ultimate conclusion we think it would end in confusion worse confounded both for the creditor and the debtor.

"Appellant urges that the decree of June 28th, 1935, was not a final decree in that the case was not finally disposed of. That decree, however, was interlocutory in its character, and definitely fixed all the rights of the parties, and it was a final and appealable decree. True, the terms of the trust indenture were not fully performed, and, indeed, full performance could not be required until 1950. However, *the property rights were fixed,* there was no failure of performance on the part of the debtor and its guarantor, and there was no indication that there would be such failure until the principal of the debt was due. Under these circumstances we think that neither the debtor nor the Court could alter those property rights as fixed by the interlocutory decree."

"The district court did not indicate the basis for its ruling. However, we think it was without jurisdiction to grant the relief prayed for."

Summarizing the foregoing orders of the U. S. District Court for the Southern District of New York, and the law applicable thereto in the enforcement of those orders, we arrive at the following conclusion: The debtor-corporation, R. Hoe & Co., Inc., in order to be discharged from the 77B proceeding, had to have the consent of two-thirds in number and amount of its creditors and each class of its stockholders affected by the plan of reorganization. By the plan of reorganization finally approved, control of the

corporation passed to the Class A stockholders, they having the right to elect nine out of the eleven directors while the common stockholders had the right to elect two directors. This situation was augmented by an additional provision which gave the common stockholders the right to vote only on the proposition of dissolution and not to vote upon the proposition of consolidation; but such limitations on the rights of the common stockholders to vote were provisional and the provision is incorporated in the plan of reorganization as follows:

> "provided, however, that after all accumulated and unpaid dividends on the Class 'A' stock are paid in full through the last quarterly dividend period and thereafter so long as the Company is not in default in four or more quarterly dividends on the Class 'A' stock (whether consecutive or not), the Common Stock, voting as a class, shall have equal rights with the Class A stock, voting as a class, on all matters other than the election of directors; and provided, further, that except with the consent of a majority of the Common Stock, no amendment of the certificate of incorporation shall be made which shall impair the right of the Common Stock voting as a class to elect and continue in office two members of the Board of Directors as such Board shall be constituted from time to time, or which shall impair the class voting rights of the Common Stock on matters other than the election of directors conferred upon it by the foregoing provisions of this sentence."

The A directors being representatives of the Federal Court were fiduciaries in respect to the common stockholders. Though the common stockholders were the owners of Hoe, the Bankruptcy Court placed the A stock-

holders in temporary control as its representative, to protect their investment. The temporary control was given to the A stockholders not as owners but as trustees. Their tenure was specifically defined and was to end as soon as their arrearages were paid. That was clearly the intent of the bankruptcy reorganization and was followed for many years.

The present group of A directors took office pursuant to that reorganization plan and as trustees for the Bankruptcy Court in 1946 when the preferred stock was eliminated. Their trusteeship was similar to a spendthrift trust in which the beneficiary (the common stockholders) is protected until he reaches a sound financial position (arrearages paid off). In establishing this trust and depriving the common stockholders of many of their rights of ownership during its existence the Bankruptcy Court did not grant power to the trustees to extend its duration—at least not without the consent of the common stockholders. Nevertheless, that is exactly what the A stockholders have accomplished here. Not only have they extended the duration of the trust but they appropriated much of the beneficiary's interest therein.

Ordinarily, trustees who appropriate the beneficiary's interest for their own use are guilty of despicable crimes. The A stockholders and directors as trustees have done the same thing here, but because they have covered their criminal act with a cheesecloth (the consolidation) the Trial Court and the Appellate Division not only did not consider it a crime but held it to be perfectly legal.

This Court should not permit itself to be blinded from the true facts and should recognize the gross breach of fiduciary duty of the A directors.

Since the decrees in the Bankruptcy Court are *res judicata* in the State Court, the provisions thereof are in

full force and effect, assuring the common stockholders the right to vote cumulatively as a class upon all matters other than the election of directors as well as upon the amendment of the certificate of incorporation.

The plaintiff was entitled to a judgment on behalf of the common stockholders declaring that the action of the Class A directors and stockholders violated a vested property right of the common stockholders contained in the decrees of the United States District Court; that the decrees of the District Court upon the basis of which the debtor, R. Hoe & Co., Inc., was discharged from bankruptcy are binding upon the debtor and the respective classes of stockholders and their privies.

POINT IV

This Court should pierce the corporate veil of "the recently formed" dummy, Hoe Export-Import Corporation, disregard its form as a subsidiary, and regard it in substance as an instrument or device conceived and created, by the Class A directors of R. Hoe & Co., Inc., for the sole purpose of the evasion of the law which gives the common stockholders the right to vote upon the proposed reorganization.

Sections 35, 51, Stock Corporation Law;
Wormser, The Disregard of the Corporate Fiction and Allied Corporation Problems, pages 63-65;
Small v. *Sullivan,* 245 N. Y. 343;
U. S. v. *Lehigh Valley R. R. Co.,* 220 U. S. 257;
Northern Securities Company v. *U. S.,* 193 U. S. 197;
Stockton v. *Central R. R. Co.,* 50 N. J. Eq. 52.

This subject is treated rather fully in Wormser's "Disregard of the Corporate Fiction and Allied Corporation

Problems" on pages 63 to 65 inclusive, where the author says:

> "Oftentimes the corporate form of organization is adopted in an endeavor to evade a statute or to modify its intent A forceful example is to be found in the learned decision of the United States Supreme Court disregarding the theory of corporate entity in enforcing the 'commodities clause' of the Hepburn Act. (*U. S.* v. *Lehigh Valley R. R. Co.* [1911], 220 U. S. 257, 31 Sup. Ct. 387 [per White, C. J.]). The commodities clause provides that:
>
> "'It shall be unlawful for any railroad company to transport from any State * * * to any other State * * * any article * * * manufactured, mined or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect * * *.'
>
> "The government, in the first suit, alleged that the Lehigh Valley Railroad Company owned stock in a coal company whose goods it was carrying. On demurrer, it was held that no violation of the statute was thereby shown; the court interpreted 'interest, direct or indirect' as meaning only a legal or equitable interest in the transported articles. (*U. S.* v. *Delaware & Hudson Co.* [1909], 213 U. S. 366, esp. 413.) The government, after this first and very serious blow, presented an amended complaint in which it was set forth, in addition to the allegations of the prior complaint, that the railroad company was using the coal company merely as a sham, a device and a dummy, in order to evade the provisions of the act.
>
> "The court held that no such evasion could succeed, and, disregarding the corporate concept and looking at the substance and reality of things, decided that it was within its jurisdiction to issue an injunc-

tion. (1911, 220 U. S. 257, *et seq.*) It is submitted that every dictate of sound reason warranted the court in holding as it did.

"The late Justice Brewer in his notable concurring opinion in *Northern Securities Company* v. *United States* (1903), 193 U. S. 197, 360-4, pointed out that, where a corporation was organized merely as a convenient means of combining separate railroad properties under one control the court could shake aside the veil of entity and regard the combination as just 'as direct a restraint of trade by destroying competition as the appointment of a committee to regulate rates.' In other words, the plain intent and purport of the Sherman Anti-Trust Act cannot be defeated by a resort to the sham and subterfuge of incorporation."

It is clear that the formation of Hoe Export-Import Corporation is a patent fraud not only upon the common stockholders but upon the corporation itself, and that the evasion of the law cannot be countenanced even when it is done by quasi-legal means.

In the words of the late Chancellor of New Jersey, in *Stockton* v. *Central R. R. Co.* (1892), 50 N. J. Eq. 52, 75-6:

"'* * * A more flimsy device, when the particulars are once known, it is impossible to imagine. It may succeed for a time in baffling persons. * * *' It must not be thought that courts are powerless to strip off disguises that are designed to thwart the purposes of the law. The mere suggestion of such a condition is an insult to the intelligence of the judiciary. Whenever such disguises are made apparent, they can readily be disrobed. The difficulty is in showing the disguises, not in penetrating them when they appear."

POINT V

There is a question of substantial public importance presented by this appeal and the motion for leave to appeal should be granted.

Respectfully submitted,

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Attorney for Plaintiff-Appellant.

Extract from Certified Copies of the Respondents' Brief at the Court of Appeals (p. 58 thereof) showing its Summary of Federal Question.

"POINT VII

THERE HAS BEEN NO VIOLATION OF THE FEDERAL COURT ORDERS.

In his brief Katz argues that this consolidation violates the plan of reorganization approved by the Federal Court in the Hoe 77 B proceeding of 1935—or, to state it differently, that the certificate of incorporation, as amended and approved by that court when the debtor was discharged in 1935, immutably defines the rights of the stockholders; and cannot later be amended or altered in any respect or by any means. To state the claim is to answer it.

Both lower courts and the Federal courts have dismissed the contention as unsound; and it is worthy that Katz' colleague, Martin, does not say one word in support thereof."